THE PROJECT RELATIVE TO A COURT OF ARBITRAL JUSTICE

Draft Convention and Report adopted by the Second Hague Peace Conference of 1907

JAMES BROWN SCOTT

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THE PROJECT RELATIVE TO A COURT OF ARBITRAL JUSTICE

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WITH AN INTRODUCTORY NOTE BY

JAMES BROWN SCOTT

TECHNICAL DELEGATE OF THE UNITED STATES TO THE SECOND HAGUE PEACE CONFERENCE OF 1907

"Inter leges silent arma"

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INTRODUCTORY NOTE

The meeting of an Advisory Committee of Jurists at The Hague, June 16–July 24, 1920, to draft a plan for a Permanent Court of International Justice, at the request of the Council of the League of Nations, suggests the advisability of publishing the Draft Convention with the Report adopted by the Second Hague Peace Conference in 1907, for the establishment of a Permanent Court of International Justice under the name and title of "A Court of Arbitral Justice."

Mr. Elihu Root, then Secretary of State of the United States, instructed the American Delegation to that memorable gathering "to bring about in the Second Conference a development of the Hague tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility. These judges should be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented. The court should be made of such dignity, consideration, and rank that the best and ablest jurists will accept appointment to it, and that the whole world will have absolute confidence in its judgments."

As a result of these instructions, Mr. Choate, Chairman of the American Delegation, proposed the establishment of such a court. The American, the British, and the German delegations presented a joint project which, with various modifications and with the unwavering support of the French Delegation, was eventually adopted. An agreement was not reached upon the appointment of the judges, owing to the pressure of

business and the limited time at the disposal of the Conference. The following resolution or recommendation was, however, adopted:

> The Conference recommends to the signatory Powers the adoption of the annexed draft Convention for the creation of a Court of Arbitral Justice, and the bringing it into force as soon as an agreement has been reached respecting the selection of the judges and the constitution of the Court.

Mr. Root, as private citizen of the United States, upon the invitation of the Council of the League of Nations, attended the Advisory Committee of Jurists at The Hague as one of its members, and had the great good fortune of carrying out his own Instructions of 1907, and of devising the method by which the judges of the Permanent Court of International Justice of the Second Hague Conference should be appointed and the Court established.

"The Permanent Court of International Justice proceeded from the Court of Arbitral Justice of 1907," to quote but a line from the report of Monsieur de Lapradelle, speaking on behalf of the Advisory Committee of 1920.

In view of the relation between the proposed Court of 1907 and the proposed Court of 1920, and the interest which must necessarily attach to the earlier project, the Report from the official Proceedings of the Second Hague Conference, explaining and justifying the Court of Arbitral Justice, is issued for the first time in separate form, for the convenience of such readers as may prefer to consult the text in English.

JAMES BROWN SCOTT,
Director of the Division of International Law.

Washington, D. C.,
September 1, 1920.

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REPORT TO THE CONFERENCE[1]

Inter leges silent arma

Gentlemen: Before undertaking the systematic exposition and analysis of the project for the establishment of the Court of Arbitral Justice, voted by the committee of examination B and referred to the first subcommission of the First Commission, it may be advisable to devote a few paragraphs, by way of introduction, to the Permanent Court of Arbitration, created

[In the official edition of the Proceedings of the Second Hague Peace Conference this Report is printed as Annex A to the Proceedings of the Ninth Plenary Session of the Conference held on October 16, 1907, volume i, pages 347-391. *Deuxième conférence internationale de la paix. Actes et documents, La Haye, 1907.* The marginal numbers in this print indicate the pages of that edition.]

[1] This report was laid before the First Commission in the name of a committee [B] composed of, first, the officers of the commission: their Excellencies Messrs. Barbosa, Mérey von Kapos-Mére, Sir Edward Fry, honorary presidents; his Excellency Mr. Léon Bourgeois, president; his Excellency Mr. Esteva, Mr. Kriege, and his Excellency Mr. Pompilj, vice presidents; Mr. Scott, reporter; and as having been designated by the subcommission, his Excellency Baron Marschall von Bieberstein (Germany), his Excellency Mr. Choate (United States of America), Mr. Lammasch (Austria-Hungary), his Excellency Baron Guillaume (Belgium), Baron d'Estournelles de Constant (France), Mr. Louis Renault (France), Mr. Fromageot (France), Mr. Georgios Streit (Greece), Mr. Guido Fusinato (Italy), their Excellencies Messrs. Eyschen (Luxemburg), Asser (Holland), Candamo (Peru), d'Oliveira (Portugal), Beldiman (Roumania) and Martens (Russia).

in 1899 by the First Conference, alongside of which it is proposed to establish a Court of Arbitral Justice.

It will be recalled that Article 16 of the Convention of 1899 provided:

> In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the signatory Powers as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle.

That this solemn declaration, based upon a broad and beneficent principle, might not remain a dead letter, the Conference undertook to create a Court in which international conflicts might be arbitrated. Article 20 provides as follows:

> With the object of facilitating an immediate recourse to arbitration for international differences which it has not been possible to settle by diplomacy, the signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention.

The framers of the Convention had in mind the arbitration of conflicts. But, the choice of judges being incidental to arbitration, they added in Article 17 that "the arbitration convention is concluded for questions already existing or for questions which may arise eventually. It may embrace any dispute or only disputes of a certain category."

If Articles 16, 20, and 17 be compared and analyzed, it is evident that questions of a judicial nature were deemed peculiarly susceptible of arbitration, and by the establishment of a Permanent Court of Arbitration it was hoped that these

questions would be frequently arbitrated and decided [348] on the basis of respect for law. So far it would seem that the foundations were laid for a real Court, in the judicial sense of the word, but arbiters, the choice of the parties litigant, instead of judges, were to be appointed.

Inasmuch, however, as the Court was declared by Article 21 to be competent for all arbitration cases, it is manifest that the framers of the Convention contemplated that questions other than those of a judicial nature might be submitted to it. There was thus created a single institution which might decide purely legal questions on the basis of respect for law, and broader questions of a nonjudicial nature, either or both of which were to be decided by judges, that is, arbiters, chosen by the parties in controversy.

In modern States judicial questions are decided by judges in courts of justice, and the judges are not the direct appointees of the parties; but in matters which may be compromised, judges appointed by the parties are as much in place as they would be out of place in a court of justice.

The difference between judicial and non-judicial questions, and the procedure applicable to each, was outlined by his Excellency Mr. BOURGEOIS before the First Commission. Replying to the criticisms of their Excellencies Mr. CHOATE and Mr. ASSER upon the work of 1899, he said:

> If there are at present no judges at The Hague, it is because the Conference of 1899, taking into consideration the whole field open to arbitration, intended to leave to the parties the duty of choosing their judges, which choice is essential in all cases of peculiar gravity. We should not like to see the Court created in 1899 lose its essentially arbitral character, and we intend to preserve this freedom in the choice of judges in all cases where no other rule is provided.

> In controversies of a political nature, especially, we think that this will always be the real rule of arbitration, and that no nation, large or small, will consent to go before a court of arbitration unless it takes an active part in the appointment of the members composing it.
>
> But is the case the same in questions of a purely legal nature? Can the same uneasiness and distrust appear here? . . . And does not everyone realize that a real court composed of real jurists may be considered as the most competent organ for deciding controversies of this character and for rendering decisions on pure questions of law?
>
> In our opinion, therefore, either the old system of 1899 or the new system of a truly permanent court may be preferred, according to the nature of the case. At all events there is no intention whatever of making the new system compulsory. The choice between the Tribunal of 1899 and the Court of 1907 will be optional, and experience will show the advantages or disadvantages of the two systems.

Impressed by these views, the framers of the present project have had in mind the establishment of a court for the determination of questions of a judicial nature, without, however, depriving the Powers of the right to resort to it for the settlement of differences of another character. Their aim and purpose is to carry the work of 1899 a step further by instituting a Court of Arbitral Justice for the judicial decisions of international controversies.

Article 20, previously quoted, looked to a Permanent Court, but it is common knowledge that the Court is not permanent, for it has to be created anew for each case submitted. There is only a permanent list from which the judges must be chosen for each particular case. The framers of the Convention meant the Court to be accessible at all times to the [349] suitors, but their hopes have been frustrated by faulty machinery. An unconstituted court cannot be said to

be accessible at any time, much less at all times. As stated by his Excellency Mr. ASSER, a founder and friend of the Court, "it is difficult, time-consuming, and expensive to set it in motion." And in the same connection his Excellency Mr. CHOATE said:[1]

> One cannot read the debates which ushered in the taking of that great step by the First Conference, without realizing that it was undertaken by that body as a new experiment . . . but with an earnest hope that it would serve as a basis . . . of further advanced work in the same direction by a future Conference. . . . And our present effort is by no means to belittle or detract from their work, but to build upon it a still nobler and more commanding structure, and it is their support that we would seek especially to enlist. . . .
>
> We do not err, Mr. President, in saying that the work of the First Conference in this regard, noble and far-reaching as it was, has not proved entirely complete and adequate to meet the progressive demands of the nations, . . . only four cases have been submitted to it, and of the sixty judges, more or less, who were named as members of the Court, at least two-thirds have not, as yet, been called upon for any service. . . . Certainly it was for no lack of adequate and competent, and distinguished judges . . . and it is out of those very judges that we propose to constitute our new proposed Court.
>
> I am inclined to think that one of the causes which has prevented a more frequent resort of nations to the Hague tribunal, . . . has been the expensiveness of a case brought there, and it should be one element of reform that the expense of the Court itself, including the salaries of the judges, shall be borne at common expense of all the signatory Powers. . . .
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> The fact that there was nothing permanent, or continu-

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[1] *Actes et documents,* vol. ii, First Commission, first subcommission, ninth meeting.

> ous, or connected in the sessions of the Court, or in the adjudication of the cases submitted to it, has been an obvious source of weakness and want of prestige in the tribunal. Each trial it had before it has been wholly independent of every other, and its occasional utterances, widely distant in point of time and disconnected in subject-matter, have not gone far towards constituting a consistent body of international law or of valuable contributions to international law, which ought to emanate from an international tribunal representing the power and might of all the nations. . . . It has done great good so far as it has been permitted to work at all. . . .
>
> Let us then seek to develop out of it a Permanent Court which shall hold regular and continuous sessions, . . . which shall speak with the authority of the united voice of the nations, and gradually build up a system of international law, definite and precise, which shall command the approval and regulate the conduct of the nations. By such a step in advance, we shall justify the confidence which has been placed in us and shall make the work of this Second Conference worthy of comparison with that of the Conference of 1899.

Such are the general features of the project we submit to you.[1]

In calling attention to the palpable defects of the older Court no attempt is made to belittle what is a landmark in the development of international arbitration, but experience shows that although the theory elaborated was correct, its practical application is susceptible of improvement. The greatest progress consists in making the Court permanent in fact. The most eloquent testimony to the necessity of this improvement is the fact that a founder and friend, and the most experienced and authoritative of living arbiters, his Excellency Mr. MAR-

[1] *Post*, p. 89.

TENS, presented in the very first days of this Conference a project for the institution of a permanent judicial committee to be selected from the present Court. If the father can lay hands upon the child and suggest that he mend his ways, it is not to be wondered at that the godfather should in his turn speak more boldly.

The United States of America has always favored in-
[350] ternational arbitration, as the ponderous volumes of Moore's *Digest* amply show. In 1899 the American delegation cooperated earnestly, shoulder to shoulder, with the British and Russian delegations in the creation of the present Permanent Court, and it has appeared as plaintiff in certain of the cases tried before it. As the United States was successful in its cases, it cannot be said that it is a defeated litigant that suggests changes and improvements of a fundamental nature. The experience of the United States with its Supreme Court leads it to believe that a Court of Arbitral Justice can be created to decide international disputes between the sovereign members of the family of nations, just as surely and truly as the Supreme Court decides disputes of an international character between the States of the American Union.

The attitude of the United States has not changed; it has always believed and said that the Court of 1899 is only the first step toward a Permanent Court of Arbitral Justice which since 1899 it has wished to see created, and in so saying it merely consults its own recent past. It may not be known generally that the United States instituted a court of arbitration exactly a hundred and thirty years ago. In the fundamental and constitutional act, called the Articles of Confederation, arbitration of international difficulties between the States was established in principle and in fact in the following manner.

According to this Act, Congress was to be the last resort on

appeal in controversies between States over boundaries, questions of jurisdiction, and other matters. When the authorities or authorized agents of a State petitioned Congress to settle a dispute or difference, notice of the fact was given to the other State in controversy and a day assigned for the appearance of the two parties by their agents, who were thereupon directed to appoint members of the tribunal by joint consent. Failing an understanding, Congress designated three citizens out of each of the United States (thirty-nine), and from the list of such persons each party could alternately strike out one, the petitioners beginning, until only thirteen remained. From these thirteen, seven or nine were drawn out by lot, and the persons thus designated composed the court, which decided the controversy by a majority of votes. A quorum of at least five judges was required. In case of non-appearance of one of the parties without a valid reason, or refusal to take part in the formation of the tribunal, the Secretary of the Congress performed this duty in his stead. The award was final in all cases, and each State pledged itself to carry out the award in good faith. The judges were required to take an oath before one of the judges of the supreme or superior court of the State in which the tribunal sat, that they would perform their duties carefully and without partiality or desire for gain.

Even a superficial examination of these provisions shows a striking likeness between the Court at The Hague and its American predecessor.

The life of the American court of arbitration was short: it failed to justify its existence; lacking the essential elements of a court of justice, it was superseded within ten years of its creation by the present Supreme Court, in which controversies which might lead to war, if between sovereign States, are settled by judicial means.[1]

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[1] *Missouri* v. *Illinois* (1905), 200 U. S., 496, 518.

Will history repeat itself?

Conscious of the weakness and defects of the American court of arbitration, and recognizing the admirable results of the judicial settlement of international controversies by a permanent court, composed of judges, the delegation of the United States presented a project for the establishment of a [351] court of law composed of learned and experienced judges, open to all the signatory Powers without the delays and formality necessarily involved in the organization for each case of a special tribunal.

When the first subcommission of the First Commission convened, August 1, 1907, it found before it two propositions looking to the permanency of the International Court. The first was a Russian project,[1] the second the original project of the American delegation.[2]

The general discussion that took place on August 1 and on August 3 dealt with the question whether the establishment of a Permanent Court composed of judges, ready to receive and decide cases submitted to it, was in itself desirable in present conditions.

On August 1 his Excellency Mr. JOSEPH H. CHOATE, first delegate of the United States of America, supported the American project.[3] He began by quoting the following passage from President ROOSEVELT's letter of April 5, last, to Mr. CARNEGIE, read at the Peace Congress held at New York:

> I hope to see adopted a general arbitration treaty among the nations; and I hope to see the Hague Court greatly increased in power and permanency, and the judges in particular made permanent and given adequate salaries, so as to make it increasingly probable that in each case

[1] *Actes et documents,* vol. ii, First Commission, annex 75.

[2] *Ibid.,* annex 76.

[3] See vol. ii, First Commission, first subcommission, ninth meeting.

> that may come before them, they will decide between the nations, great or small, exactly as a judge within our own limits decides, between the individuals, great or small, who come before him. Doubtless many other matters will be taken up at the Hague; but it seems to me that this of a general arbitration treaty is perhaps the most important.

His Excellency Mr. CHOATE then stated that the instructions to the delegation were to secure, if possible, a plan by which the judges shall be selected from the different countries, that the different systems of law and procedure and the principal languages shall be fairly represented.

> We have not (said he), in the proposition which we have offered, attempted even to sketch the details of the constitution and powers and character of our proposed court. We have not thought it possible that one nation could of itself prescribe or even suggest such details, but that they should be the result of consultation and conference among all the nations represented in a suitable committee to be appointed by the president to consider them.
>
> The plan proposed by us does not in the least depart from the voluntary character of the court already established. No nation can be compelled or restrained to come before it, but it will be open for all who desire to settle their differences by peaceful methods.

Having thus described the project, Mr. CHOATE gave an outline of its main provisions:

> In the first article we suggest that such a Court of Arbitration ought to be constituted—and that is the great question of principle to be first decided. . . . The judges should enjoy the highest moral consideration and a recognized competence in questions of international law. They shall be designated in such a way that the nations, great and small, without distinction shall have a voice in designating the manner of their choice. They shall fairly rep-

resent all the different systems of existing law and procedure, all the principal languages of the world; they shall be named for a certain number of years, to be decided by the Conference, and shall hold their offices until the nomination of their successors.

[352] The second article provides that the Permanent Court shall sit annually at The Hague, and that they shall remain in session as long as the business that shall come before them will require; that they shall appoint their own officers and, except as this or the succeeding Conference prescribes, shall regulate their own procedure; that every decision of the Court shall be by a majority of voices.

It is best that the judges shall be of equal rank, shall enjoy diplomatic immunity, and shall receive a salary, to be paid out of the common purse of the nations, sufficient to justify them in devoting to the consideration of the business of the Court all the time that shall be necessary. The third article expresses the preference that in no case, unless the parties otherwise agree, shall any judge of the Court take part in the consideration of any matter coming before the Court to which his own nation shall be a party. In other words, this Court shall be in all respects strictly a court of justice and not partake in the least of the nature of a joint commission.

By the fourth article the jurisdiction of this Permanent Court would be large enough to embrace the hearing and decision of all cases involving differences of an international character between sovereign States, which may be submitted to it by an agreement of the parties; that it shall not only have original jurisdiction, but that it shall be competent to entertain appeals from other tribunals, and to determine the relative rights and duties arising out of the conclusions of commissions of inquiry or sentences of specially constituted tribunals of arbitration.

The fifth article provides that the judges of the Court shall be competent to act as judges upon commissions of inquiry or special arbitration tribunals, but in that case,

> of course, not to sit in review of their own decisions. To sum up, the Court shall have the power to entertain and dispose of any international controversy that shall be submitted to it by the Powers.[1]

His Excellency Mr. MARTENS thereupon pronounced a remarkable discourse,[2] showing that under the terms of the program for the Conference the creation of a Permanent Court was permissible, and giving the idea of permanence the support of his theories and practical experience.

> We are agreed upon one essential and indisputable fact, namely, that the present Permanent Court is not organized as it should be. An improvement is needed, and it is our task to make it. This task is an important one, indeed the most important one, in my opinion, of all those devolving upon us.
>
> I have under my eyes the Russian circular of April 3, 1906, which contains the program adopted by all the Powers. It speaks, first of all, of the necessity of perfecting the principal creation of the Conference of 1899, that is, the Permanent Court: "The First Conference separated in the firm belief that its labors would subsequently be perfected from the effect of the regular progress of enlightenment among peoples, and abreast of the results acquired from experience. Its most important creation, the International Court of Arbitration, is an institution that has already proved its worth and brought together, for the good of all, an areopagus of jurists who command the respect of the world."

But his Excellency Mr. MARTENS recognized the deficiencies in the work of 1899. "The Court of 1899 is but an idea which

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[1] Mr. Scott thereupon explained technically and in detail the principles upon which a Permanent Court should be based.

[2] See vol. ii, First Commission, first subcommission, ninth meeting.

occasionally assumes shape and then again disappears." The realization of these effects induced the Russian delegation to present a project,[1] but it did not by any means offer its project as the sole basis of the deliberations. The project in the first place sanctions the absolute choice of the arbitrators by
[353] the Powers. The idea of the list is retained, but, considering that the arbitrators of the case should be known to each other and be at least in part at the disposal of the States, Mr. MARTENS suggested the idea of periodical meetings, during which the members should select a permanent tribunal of arbitration to be always at the disposal of the Powers which might desire to have recourse to it.

This Permanent Court was to be composed of three members, but the number of judges could be increased at any time. Instead of three members, five, seven, or nine could be elected. This is, however, a question of detail.

The advantage of the Russian project consists in the retention of the present foundations, on which it proposes to construct another edifice better adapted to the just demands of international life.

His Excellency Baron MARSCHALL VON BIEBERSTEIN pledged, in brief but eloquent terms, the support of the German delegation:

> I declared a few days ago that the German Government considers the establishment of a Permanent Court of Arbitration as a real step in the line of progress.
>
> I wish now, while this discussion is being opened, formally to repeat my declaration in the name of the German delegation. I take a genuine pleasure in accepting the general principles so eloquently defended by the delegates from the United States of America.
>
> We are ready to devote all our energy toward the ac-

[1] Vol. ii, First Commission, annex 75.

complishment of this task which Mr. MARTENS very correctly defined, on presenting it, as one of the most important ones of the Second Peace Conference.

His Excellency Sir EDWARD FRY gave to the idea the support of the British delegation, and their Excellencies Messrs. DE LA BARRA, on behalf of Mexico, and LARRETA, DRAGO, and SÁENZ PEÑA, first delegate from Argentine, stated that their delegations were in favor of the idea of permanency. At the following session their Excellencies Messrs. ESTEVA, first delegate from Mexico; MILOVANOVITCH, in the name of the Serbian delegation; BELISARIO PORRAS, delegate from the Republic of Panama; J. N. LÉGER, delegate from Haiti; JOSÉ GIL FORTOUL, delegate from Venezuela; IVAN KARANDJOULOFF, delegate from Bulgaria; the Marquis DE SOVERAL, in behalf of Portugal; SAMAD KHAN MOMTASES-SALTANEH, in behalf of Persia; and J. P. CASTRO, in behalf of Uruguay, stated that they agreed to the general outlines of the American project, some without reservation and others making reservations regarding the composition of the Court. His Excellency Mr. ESTEVA, in particular, maintained that he voted only with reservations, "because the principles which are to serve as a basis in the establishmeent of the Permanent Court were of such great importance that the Mexican delegation would not give its final vote until it had learned of the various projects for the organization of the Court."

In the session of the third of August, his Excellency Mr. CHOATE repeated that the proposed Court was not to be obligatory, that it was not to supplant the Permanent Court of 1899, and that each litigant should have the freedom to choose between the two institutions.

His Excellency Mr. BEERNAERT of Belgium delivered a long and careful address in which he replied to the arguments in favor of the proposed Court, and professed his profound and

earnest conviction that the line of progress was in the old direction, that the institution of 1899 was preferable to the proposed one, which, by imposing permanent judges upon the litigants, would destroy the principles of selection which is the essence of arbitration.

His Excellency Sir EDWARD FRY replied briefly, stating in a few short sentences the problem before the Commission:

> If it were a question of supplanting the present Permanent Court by a new Court to be created, I should without hesitancy side with his Excellency Mr. BEERNAERT, [354] but the American scheme proposes the creation of a new Court *in addition* to the present Court. The two Courts will work together toward the same goal, and the one which appears to answer the needs of the nations best will survive.
>
> The choice will be free to the nations, and it will be very certain that the most effective Court will be chosen.

His Excellency Mr. LÉON BOURGEOIS, who spoke not as the president of the Commission, but as first delegate of France, distinguished between the Permanent Court of Arbitration of 1899 and the proposed Court, showing conclusively that each would have its separate and distinct sphere of interests and influence.

> What we must ascertain (he said) is whether, for limited purposes and under special conditions, it is not possible to secure the working of arbitration more quickly and easily under a new form in no way incompatible with the first one.
>
> For questions of a purely legal nature a real court composed of jurists should be considered as the most competent organ. . . . It is therefore either the old or the new system that is to be preferred, according to the nature of the cases.
>
> Thus we see before us two distinct domains: that of

permanency and that of obligation. However, we reach the same conclusions in both domains.

In the domain of universal arbitration there is a zone of possible obligation and a zone of necessary option. There is a vast number of political questions which the condition of the world does not yet permit to be submitted universally and compulsorily to arbitration.

Likewise, in the domain of permanency, there are cases whose nature is such as to permit and perhaps warrant their submission to a permanent tribunal. However, there are others for which the system of 1899 remains necessary, for it alone can give the States the confidence and security without which they will not appear before arbitrators.

Thus it is seen that the cases for which the permanent tribunal is possible are the same as those in which compulsory arbitration is acceptable, being, generally speaking, cases of legal nature. Whereas political cases, in which the States should be allowed freedom to resort to arbitration, are the very ones in which arbitrators are necessary rather than judges, that is, arbitrators chosen at the time the controversy arises.

The president having thereupon submitted the American proposition to a vote, twenty-eight votes were cast in favor of taking into consideration the establishment of a Permanent Court of Arbitration, twelve States refraining from voting.[1]

The American and Russian propositions were then referred

[1] See vol. ii, First Commission, first subcommission, tenth meeting. Those voting in favor of the motion were Germany, United States, Argentine, Brazil, Bulgaria, Chile, China, Colombia, Cuba, Dominican Republic, France, Great Britain, Haiti, Italy, Japan, Luxemburg, Mexico, Montenegro, Panama, Paraguay, Netherlands, Peru, Persia, Portugal, Russia, Salvador, Uruguay, Venezuela. Those refraining were Austria-Hungary, Belgium, Denmark, Spain, Greece, Norway, Roumania, Serbia, Siam, Sweden, Switzerland, Turkey.

to the committee of examination for the elaboration of a project.[1]

The committee of examination was therefore confronted by two projects at its first meeting on August 13, 1907. The [355] Russian project[2] was not discussed. The American project[3] served as a basis for discussion, but it is useless to consider it in detail, for it was withdrawn in favor of a common project of the German, American, and the English[4] delegations. Later, at the third meeting on August 20 his Excellency Mr. BARBOSA, first delegate from Brazil, presented a project[5] which he accompanied by a powerful and detailed address. This project was, however, afterwards withdrawn by his Excellency Mr. BARBOSA.[6] Propositions from the Bulgarian, Haitian, and Uruguayan delegations regarding the composition of a Permanent Court were also presented.[7]

Upon the presentation of the project of the three delegations of Germany, the United States, and Great Britain, for the organization of a Permanent Court, an animated discussion arose as to the name which the Court, if established, should

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[1] As in the case of obligatory arbitration the president added to the committee a certain number of members: their Excellencies Baron MARSCHALL VON BIEBERSTEIN, Mr. CHOATE, Mr. EYSCHEN, Mr. BELDIMAN, Mr. CANDAMO, and Mr. LOUIS RENAULT. At the first meeting of the committee of examination B, the president appointed a subcommittee for drafting composed of Messrs. ASSER, RENAULT, KRIEGE, LAMMASCH, CROWE, SCOTT. Mr. SCOTT was designated reporter of committee of examination B.

[2] *Actes et documents*, vol. ii, First Commission, annex 75.

[3] *Ibid.*, annex 76.

[4] *Ibid.*, annexes 80 and 81.

[5] *Ibid.*, annex 83.

[6] See First Commission, first subcommission, committee of examination B, eighth meeting.

[7] Vol. ii, First Commission, annexes 77, 78 and 47.

bear. For it was felt that, wittingly or unwittingly, the name chosen either would or should express the nature of the institution to be created.

The name chosen in the first draft was "High International Court of Justice," the intention of the authors of the project being to indicate that the Court was to be an International Court and that its purpose would be to decide any and all claims submitted to it under a sense of that judicial responsibility which is supposed peculiarly to exist in courts of justice.

It was objected that the expression "High Court" indicated the existence of inferior courts from which an appeal might be taken. It was suggested by the Austro-Hungarian delegation that a misunderstanding might arise, and that the expression "High Court" might seem to be synonymous with a court of cassation. The British delegation explained that the term "High Court" as understood in Great Britain did not imply necessarily this idea, but is also used to designate a court of first instance for certain cases of great importance.

Another objection made to the terminology was the use of the word "justice" because, if unqualified, it would seem or might seem that the Court to be created was a law court in the strict judicial sense rather than a Court of Arbitration. The Austro-Hungarian delegation therefore proposed that the title should show clearly the arbitral nature of the Court.

His Excellency Mr. BARBOSA felt that the unqualified presence of the word "justice" would not only give rise to a misunderstanding, but would be a mistake, because the purpose for which the Court was intended was the administration of arbitral justice.

His Excellency Mr. CHOATE, speaking for the authors of the project, expressed a willingness to accept the title which seemed most satisfactory. "We leave," he said, "the christening of the child to the committee. If all the sponsors agree

upon the name, we will endorse their choice. Once christened, the child's success in life depends on its acts, not on its name." To this the President replied: "The question is not merely one of name, but rather of sex. In any event, the committee is unanimously of the opinion that the new institution should not be vested with the attributes of a court of appeal."

The authors of the project, taking note of the desire of the committee, proposed in second reading the title "International Court of Justice," but, yielding to the general desire of [356] the committee, finally accepted the title "Court of Arbitral Justice" as the one most likely to indicate at once the nature and scope of the proposed institution.

Having ascertained the name of the Court, we can now pass in review the articles which explain its nature and functions.

Project for the Establishment of a Court of Arbitral Justice [1]

Article 1

With a view to promoting the cause of arbitration, the contracting Powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Court of Arbitral Justice, of free and easy access, composed of judges representing the various juridical systems of the world, and capable of ensuring continuity in arbitral jurisprudence.

An attentive examination of the first article of the project shows the reason for the creation of the Court, namely, first, "to promote the cause of arbitration," and secondly, to assure "the continuity of arbitral jurisprudence." In order to attain these desirable ends, the authors of the project considered as indispensable a court in permanence, as distinct from a court to be constituted for a particular occasion, access to which should be free and easy, and which, by embracing in its com-

[1] *Post*, p. 89.

position the different juridical systems of the world, would be fitted to ascertain and develop a system of international law based upon a large and liberal spirit of equity in touch with the needs of the world.

International law, which ought to be an international system, as understood and applied in any community is, unfortunately, insensibly influenced by national feeling or local prejudice, much as the stream is colored by the stratum over which it flows. For this national interpretation it was sought, by means of the Court, to substitute an international interpretation, and by a series of decisions based upon each other and pervaded by a sense of justice, it would seem no vain hope that the institution so created would not only develop but, in the course of time, create by judicial means a system of jurisprudence truly international. In the absence of the distinct legislation it must always be a question open to discussion, how far a tribunal is bound by previous or existing decisions. The difficulty becomes infinitely greater when isolated tribunals of arbitration pass upon the same allied questions without the sense of responsibility which comes from a previous decision of the same tribunal. By the establishment of a Court of Arbitral Justice it may be hoped, indeed expected, that a Court sitting in permanence will not lightly overrule or deviate from previous decisions unless there be overwhelming and compelling reasons; and it is also clear that judges, knowing that their decision is likely to be authority with its successor and cited as a precedent, will devote the labor and reflection to the decision necessary to make it a landmark in international law. The twofold purpose, namely, "to advance the cause of arbitration" and to assure "the continuity of arbitral jurisprudence," would seem to demand a Permanent Court, and the permanence of the Court would insensibly and inevitably assure the scientific development of arbitral jurisprudence.

[357] To effectuate the fundamental purpose of the Court it is not alone sufficient that it be permanent, although permanency is indeed a first requisite. If the Court is to develop an international system of law, it seems to need no argument that the various systems of law should find representation within the Court and upon the bench. The problem is here complicated by the fact that many systems of law exist and that these various systems must find adequate representation. Different systems of law exist in different States, but an international court must embrace the various systems of the world. If the Court is to judge according to equity and international law, it must not be the equity of any one system, but the equity which is the resultant of the various systems of law. As the jurist is influenced by his system of law and the training in it, it is necessary to have judges trained in the various systems of law. For the purpose of the Court municipal law must be internationalized. In this case, and in this case only, can the judgment be equitable in any international sense.

It is stated that the jurist is the product of his training. It is likewise true that the individual is influenced by his environment and possesses, in greater or lesser degree, the characteristics of his nation. It would be futile, if indeed it were possible, to denationalize a judge. But the presence in the Court of divers judges representing in their intellectual development characteristics of their respective nations, would go far toward engendering an international spirit.

But even admitting the presence of the various prerequisites for a Court of Arbitral Justice, it is necessary that the access to the Court be easy, indeed that it be free; otherwise the difficulties of the Permanent Court of 1899 arise. It is not sufficient that the door be opened. It will not do that the door be opened with difficulty. It must not be forced; it must yield readily to the touch of plaintiff or defendant. In the interest

of justice and of the peaceful settlement of international difficulties it should be open. It should invite, not discourage, attendance, and therefore burdensome conditions should not exist. The access should be free and easy; free in the sense that no fee should be paid for entrance, and easy in that the desire to enter should of itself be sufficient. It therefore seemed indispensable to the authors of the project that the preliminary expenses should not be required, and that the expenses of the Court, including therein the salaries of the judges, should be borne by the signatory Powers, not by the individual suitors; for expenses incurred in the interest of all should be shared by all.

The original draft expressed this thought by the phrase "easy and gratuitous access." As, however, the word "gratuitous" seemed ambiguous, it was suggested by his Excellency Mr. MARTENS that a phrase be chosen that gives full expression to the thought it was intended to convey; and as each litigant was to bear its own expense and an equal share of the costs in the case, it was suggested that the expression "easy and free" would be less misleading and therefore more accurate. The suggestion of Mr. MARTENS was accepted and incorporated in the text adopted by the committee.

Admitting the Court of Arbitral Justice to be necessary or advantageous, the question naturally arises, what should be the relation between the proposed Court and the existing Permanent Court of Arbitration? Were the Court intended as a substitute for the Permanent Court, the question would be one of no great importance, but as the authors of the project disclaimed expressly any intention to displace or indeed modify the creation of 1899, it was necessary that this intent should find adequate expression. It would be possible to organize a new Court without mentioning the old, so that the two institutions, each meant for a different purpose, would coexist. A

matter of such fundamental importance should not, [358] however, be left to implication, and the authors of the project expressed the idea clearly and precisely in the words "agree to organize alongside the Permanent Court of Arbitration." As, however, the expression "alongside" might seem to reflect upon the older and existing institution, it was decided, upon the motion of his Excellency Mr. MÉREY, that the text of Article I should state, in definite terms, that the new Court presupposes the existence of the old. The idea advocated by Mr. MÉREY was accepted in the final text: "without altering the status of the Permanent Court of Arbitration," for the latter expression includes not merely the desire to maintain the Court of 1899, but states positively that the new Court shall not injure or alter the Permanent Court of Arbitration.

But the question is still unanswered, namely, what is the relation between the two Courts? Various views were expressed on the subject. One view would make the new Court a simple committee of the older Court, but constitute it within the Permanent Court. Another view, differing but slightly from the former, would make it independent in name, but by appointing its judges from the members of the Permanent Court of Arbitration would, in reality, make it a development of the latter. Still another view would recognize the independence of the institution by placing it alongside the Permanent Court as an independent institution, but would establish a close connection between the two by appointing its judges, as far as possible, from among the members of the original Court.

As will be seen, the last view was the one accepted by the committee.

ARTICLE 2

The Court of Arbitral Justice is composed of judges and deputy judges, chosen from persons of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to

occupy high legal posts, or be jurists of recognized competence in matters of international law.

The judges and deputy judges of the Court are appointed, as far as possible, from the members of the Permanent Court of Arbitration. The appointment shall be made within the six months following the ratification of the present Convention.

It will be seen that this article is composed of three parts dealing respectively, first, with the qualification of the judges; secondly, with their nomination; and thirdly, with the time within which the nomination shall be made. Let us consider each in its proper order.

It cannot be denied that the respect for a court of justice depends upon the character and attainments of its judges, and every community, with even a rudimentary respect for justice, must see to it that the bench, like Caesar's wife, be above suspicion. The method of selection may vary according to time, place and circumstance. The judge may be appointed by the sovereign Power or he may be elected by popular vote; in any case he must possess the qualities which not only inspire but command respect.

The Convention of 1899 prescribed that the persons chosen for arbitrators should be "of known competency in questions of international law," and that they should, in addition, enjoy "the highest moral reputation."

It seemed unnecessary to the authors of the present project to express this requirement; because it is impossible to suppose that the signatory Powers would select any who [359] did not possess this character in the highest degree.

But in order that it might not seem to have escaped attention, and for the sake of completeness, the passage was borrowed from the Convention of 1899 and incorporated in the final wording of the article. The additional requirements stipulated in the present article arise from the very nature of the institution.

As his Excellency Mr. LÉON BOURGEOIS pointed out, the Permanent Court of 1899 was fitted to subserve a twofold purpose, namely, the decision of political and of judicial questions. As the present Court is preeminently destined, as indicated by its name and its nature, to decide judicial questions and to act as a Court of Arbitral Justice, it seemed necessary to require that its judges should possess the qualifications for judges in their respective countries; otherwise they might not bring to the Court that knowledge of their various judicial systems so essential to the successful operation of an international tribunal. In the next place, it was hoped that the judges and deputy judges for the new Court should possess the qualifications for appointment to the highest courts of their respective nations.

The fundamental purpose of the authors of the project was clearly and succinctly expressed by Mr. KRIEGE in the following language: [1]

> There are certain States in which eligibility to the various judicial offices is governed by requirements of various kinds and degrees. If we should not require that an international judge possess all of the judicial qualifications required of the justices of the supreme court of his own country, if we should confine ourselves to prescribing that the judges fulfil the conditions required for appointment to a judicial office, it would, theoretically, be possible to send to the Court persons who do not possess the competence without which its important duties cannot be performed. In some countries, for instance, persons who have not even read law may be appointed to the office of justice of the peace. It is obvious that such a magistrate should not sit on an international bench.

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[1] See vol. ii, First Commission, first subcommission, committee of examination B, sixth meeting.

But foreseeing the possibility that the greatest authorities upon the subject of international law might not have fulfilled judicial posts in their respective countries, or indeed might not in some cases possess the requirements for admission to the supreme court in their respective countries, the authors of the project provided that "jurists of recognized competence in matters of international law" should be eligible. The purpose was to open the Court to all who possess the qualifications, accentuating, as far as possible, judicial experience. The authors of the project could not overlook the fact that the most competent authorities in international matters are often to be found in our universities and schools of learning.

The purpose, as thus clearly outlined in the first paragraph, is to obtain a body of jurists trained in the municipal law of the various countries, and familiar, practically as well as theoretically, with the details and intricacies of international law as it has slowly developed during centuries of conflict and assumed a definite and systematic shape. It is universally admitted that no method of selection, and no qualifications, however rigid, will infallibly produce the jurist. In the last resort the man is superior to any qualifications, and the excellence of the Court must depend upon the character and personality of the judges selected rather than upon academic and artificial distinctions.

The second paragraph of Article 2 deals with the selection of persons who possess the qualifications of judges, and in this connection the committee took occasion to express fully and in detail the relation that should exist between the Permanent Court of Arbitration and the new Court.

[360] His Excellency Mr. BARBOSA declared that the expression that the judges should be chosen, as far as possible, from the members of the Permanent Court failed to establish any really obligatory rule to do so, and that rather than seem

to create a legal obligation where none existed, it would be better to say that the signatory Powers *might* choose the judges and deputy judges from the members of the Permanent Court.

It might well happen, however, that none of the judges of the present Court could accept a permanent appointment, either because they were otherwise engaged at home or because they might be unwilling to pledge themselves to remain permanently or frequently at The Hague. His Excellency Mr. ASSER thought the objection might be met by permitting each State to appoint an additional judge, making the number of judges appointed by each State for the actual Court five instead of four, to which his Excellency Mr. CHOATE replied that the addition of an extra judge would increase a list already large. His Excellency Baron MARSCHALL VON BIEBERSTEIN felt that the choice among the members of the Court of 1899 should be the rule, whereas the president of the committee preferred that the judges of the new Court should be chosen *by* and *from* the members of the Court of 1899. He subsequently proposed that the rule of appointment suggested by Baron MARSCHALL be adopted in principle, and that in default of suitable members in the Permanent Court the signatory Powers might then be free to look beyond the members of the present Court.

Baron MARSCHALL suggested that, on the whole, the method announced in the second article should be retained, and the matter was referred to the drafting committee to consider and report a final text. The committee, after mature reflection, preferred the original text, and as such it was ultimately adopted.

In this way your committee indicated very clearly its desire that the signatory Powers should appoint the judges and deputy judges from the members of the present Court as far as circumstances would permit. Of these circumstances the signatory Powers, as sovereign States, would be, naturally and ex-

clusively the judges. While, therefore, the proposed Court would be independent, as indicated in the first article, it would nevertheless derive in large measure its strength, substance, and influence from the institution of 1899. In the plenary session of the First Commission, on Thursday, October 10, the wording of the paragraph was slightly modified upon the motion of his Excellency Mr. HAMMARSKJÖLD, first delegate of Sweden, so as to bring it into greater harmony with the provisional character of the text, which presupposes for its application an agreement of the nations. The word "choice" was substituted for "nomination," and the phrase "signatory Powers" was omitted. In this form the article is more accurate, although its meaning remains unchanged.

The last part in Article 2 is purely formal in its nature. It neither gave rise to discussion in the committee nor does it need explanation in the report, for it provides merely that the judges shall be nominated within the six months following the ratification of the present Convention.

ARTICLE 3

The judges and deputy judges are appointed for a period of twelve years, counting from the date on which the appointment is notified to the Administrative Council created by the Convention of July 29, 1899. Their appointments can be renewed.

Should a judge or deputy judge die or retire, the vacancy is filled in the manner in which his appointment was made. In this case, the appointment is made for a fresh period of twelve years.

Article 3 commended itself generally to the committee of examination, for both in the first and the second reading of the project it was adopted without comment or observation.
[361] It stipulates that the judges of the Court are nominated for a certain term and that they are reeligible. The fundamental idea underlying this provision was to secure

regularity and continuity of judicial decision, for it was thought advisable, indeed essential, that the international community should have the benefit of the experience acquired by a judge upon the bench. The provision of the reappointment of the judges aimed to establish another guaranty in this respect as well as to assure the permanence of the Court itself.

In the next place it is necessary that the appointment of the judge be notified in some way to an international body, and it was thought advisable to notify each individual appointment to the Administrative Council instituted by the Convention of July 29, 1899. The Administrative Council was designated for this purpose because it is composed of the diplomatic representatives of the signatory Powers, and it was felt that the appointment of the judge, in itself a high international act, should be communicated to the representatives of the nations rather than to the International Bureau, which possesses clerical rather than diplomatic standing.

The second paragraph of Article 3 deals with the filling of a vacancy, whether caused by the death or resignation of a judge. It will not escape your notice that this provision is borrowed from Articles 23 and 35 of the Convention of 1899. It has nothing to do with the causes of the vacancy, which may lead to much controversy and give rise to differences of opinion. It simply provides that the vacancy, however created, should be treated as an original vacancy, and that the judges should be appointed in the manner provided for in the first paragraph. It necessarily follows, therefore, that the appointment to fill a vacancy should be for the full term of twelve years.

The question arose frequently in committee, and was carefully examined, whether a provision should not be inserted in the project guaranteeing the immovability of the judges. The committee of examination gave the matter their earnest con-

sideration, and came to the conclusion that it was unwise to give fuller expression to the doctrine of immovability or to attempt to define in advance the causes which might lead to the removal of judges. It was suggested that the legislative dispositions of the signatory Powers might be taken as guide, but as these are so various it seemed impossible to reconcile them and state the result in a single article.

The authors of the project considered that fixing the mandate of the judge at a period of twelve years was in itself a sufficient guarantee against arbitrary revocation, and that the exercise of the right of recall or dismission should be left to the good sense as well as the good faith of the various Governments. The nomination for the period of twelve years and the provision for a new appointment in vacancies arising from death or resignation of the judge in reality establish the principle of immovability.

Should the Government recall its judge and appoint another in his stead, the appointment would nevertheless be valid, because upon taking oath as judge he is entitled to participate in the decision of the cases, and the judgment in which he takes part would likewise be valid and binding.

Although the matter seems free from doubt, nevertheless, upon the suggestion of the president, the conclusion of the authors of the project upon the validity of a judgment rendered in such circumstances is specifically stated in the report, lest future interpretation or controversy might question the jurisprudence which the Court is called upon to develop.

It was proposed to include in the general term of "unworthiness" all grounds of dismissal, but the difficulty then presented itself as to who should be the judges of the question.

No positive provision is therefore inserted in the project on this subject, and the case is left to be decided when and as it arises.

[362] In choosing the relatively long term of twelve years the authors of the project had in mind not merely to secure the tenure of the judge and the desire to give the signatory Powers the benefit of the experience obtained by the exercise of the judicial functions, but also to safeguard, as far as possible, the fundamental and controlling principle of impartiality; for association in the analysis and development of international law and cooperation in judicial decision would develop inevitably an *esprit de corps,* which would necessarily influence each judge in the performance of his duties. Acting under judicial responsibility, individual opinion, indeed prejudice, would lose something of its rigidity, and the decision of the Court would offer the highest guarantees for international impartiality.

ARTICLE 4

The judges of the Court of Arbitral Justice are equal and rank according to the date on which their appointment was notified (Article 3, paragraph 1). The judge who is senior in point of age takes precedence when the date of notification is the same.

The deputy judges are assimilated, in the exercise of their functions, with the judges. They rank, however, below the latter.

The provisions of Article 4 are largely formal in their nature and self-explanatory. It, however, seemed advisable to the authors of the project to state the provisions in clear terms, so that as little as possible be left to conjecture.

The judges of the Court are and must necessarily be equal. As they all cannot occupy one place at the same time, it seemed advisable to prevent the possibility of a dispute as to rank or position. Anyone familiar with the history of diplomacy will recall the difficulty that grave and dignified diplomats have had in finding their appropriate places at international conferences.

It seemed proper that the rank of the individual judge should be determined by the date of his appointment, as provided in Article 3, paragraph 1. But it might well happen that two judges were appointed on the same date and entered upon the performance of their duties simultaneously. To obviate disagreement or conflict, however trifling, the authors of the project provided that precedence should in that case yield to age. This provision is of importance in case the president and vice president do not take part in the determination of a case before the Court (Article 26, paragraph 1).

The second paragraph of the article assimilates the deputy to the titular judges in the performance of judicial functions, but indicates in clear and express terms that the deputies take rank after the titular judges, although among themselves the provisions of the first paragraph would apply.

The second paragraph of the fourth article, which has been borrowed from the Prize Court Convention, was added to bring the Prize Court and the Court of Arbitral Justice into harmony.

ARTICLE 5

The judges enjoy diplomatic privileges and immunities in the exercise of their functions, outside their own country.

Before taking their seat, the judges and deputy judges must, before the Administrative Council, swear or make a solemn affirmation to exercise their functions impartially and conscientiously.

This article is composed of two paragraphs, each dealing with a separate yet not dissimilar subject. The provisions that the judges shall, in the performance of their duties, [363] enjoy the privileges and immunities of diplomatic agents is too familiar to need comment, and is taken without modification from the Convention of 1899 (Article 24).

It cannot be denied, however, that the wording of the latter text is rather general and indefinite, because the privilege and

immunity referred to may concern only the privileges and immunities at The Hague, or it may relate to diplomatic immunity in third countries. This ambiguity was pointed out by Professor LAMMASCH, in very apt language.[1]

He remarked that it would be advantageous to define more clearly the words "outside of their countries," because it is possible that a State may choose as judge a citizen or subject of another State, in which case it would be necessary to stipulate in Article 5 that "their countries" means "the countries of origin."

Mr. KRIEGE felt that a mention of the observation of Mr. LAMMASCH in the report would be sufficient, and that it was inadvisable to modify the text of 1899, which has been generally approved and accepted.

The second paragraph of Article 5 relates to the oath or affirmation which the judge or deputy is to take before entering upon the performance of his official duties.

The history of courts of justice shows that the matter of oath and the supposed religious sanction attaching to it has, at times, created great difficulty in one and the same country. It will not escape reflection that men of the highest character and professional attainment have refused to take an oath, but have expressed their willingness to make a solemn affirmation. Controversy and discussion have resulted in authorizing a person, entering upon official duty, to pledge his conscience to faithful performance in the manner binding upon him personally and individually, and affirmation is assimilated to oath. In countries of diverse nationalities and in which different religious systems prevail it would seem inexpedient to attempt to provide an oath binding upon all. It was suggested that the oaths required of the judicial officers in their respective

[1] See vol. ii, First Commission, first subcommission, committee of examination B, sixth meeting.

countries might be the test, but as these differ there would be a lack of uniformity. It was therefore finally proposed by the authors of the project that the judge should take an oath or solemn affirmation to exercise judicial functions incumbent upon him impartially and conscientiously, and that for purely formal reasons this oath should be taken before the diplomatic representation, namely, the Administrative Council at The Hague. In this manner the oath or affirmation would be a matter of international record.

ARTICLE 6

The Court annually nominates three judges to form a special delegation and three more to replace them should the necessity arise. They may be reelected. They are balloted for. The persons who secure the largest number of votes are considered elected. The delegation itself elects its president, who, in default of a majority, is appointed by lot.

A member of the delegation can not exercise his duties when the Power which appointed him or of which he is a *ressortissant* is one of the parties.

The members of the delegation are to conclude all matters submitted to them, even if the period for which they have been appointed judges has expired.

In the original text of the project the present article appeared as follows:

[364] ARTICLE 6

The High Court shall annually nominate three judges, who shall form a special committee during the year, and three more to replace them should the necessity arise.

A member of the committee cannot exercise his functions when the Power which appointed him is one of the parties.

The members of the committee shall conclude all matters submitted to them, even if the period for which they have been appointed judges has expired.

It will be seen that the article has undergone considerable modification in subsequent amendments, due to criticism and suggestion within the committee. These modifications are of two kinds, the first affecting the form, the second the substance.

His Excellency Mr. MARTENS objected to the use of the words "special committee" as inconsistent with the nature and purpose of a court of justice.

Desiring to overcome this objection because the functions would be the same whatever the name ultimately chosen might be, the committee of examination proposed "commission," in order to bring the Prize Court and the proposed Court into exact harmony. Mr. MARTENS objected that "special commission" was as unsatisfactory as "special committee," and proposed "special tribunal."

This expression was, however, objectionable, because the use of the word "tribunal" might lead to misunderstanding, as the word was used in a different sense in the Convention of 1899. Another and more fundamental objection to the use of the word "tribunal" seemed to exist in the fact that its presence might suggest that the small committee was in itself a separate and distinct court charged with the performance of certain duties and functions. As the purpose of the authors of the project was to create a single court for the decision of international difficulties of a judicial nature, it seemed inadmissible to use an expression which might by implication suggest the creation at one and the same time of two institutions. As the small body proceeded from the larger body and derived all of its power from the larger, it was finally suggested that the expression "delegation" would indicate the source and forestall all interpretation. The expression "special delegation" was therefore used in the first instance, but in the subsequent articles the small body is referred to as "delegation" without the adjunction of the word "special."

In the next place, the wording was criticized as faulty because, while providing that three members should be designated, the method of their selection was left undetermined. For that reason the committee of examination provided in the amended text that the three members, and the deputies to replace them in case of their inability to act, should be elected by ballot by the Court, and that those should be considered elected who received the greatest number of votes.

His excellency Mr. MARTENS proposed that the three members and their deputies composing the delegation should be capable of reelection. The right of the Court to designate the members necessarily presupposes this possibility, but the committee of examination followed the suggestion of Mr. MARTENS by stating it *expressis verbis.*

The original text of Article 6 made no reference to the president of the delegation, it being supposed that the rules of Court would prescribe the necessary regulations. However, it was subsequently decided that the article should be complete in itself and not leave a matter of such importance to future regulation. The delegation, therefore, was given power to elect its president by majority, and failing a majority, to select him by lot.

The emendations of paragraphs 2 and 3 of the article under consideration went to their substance. The authors of
[365] the project meant to exclude from the delegation subjects or citizens of the party in litigation, believing that their presence in such a small body might tend to destroy the judicial character of the delegation by assimilating them too closely to arbiters.

Mr. LAMMASCH suggested that a nation entitled to appoint a judge of the Court of Arbitral Justice might select a subject or citizen of another country, and that, during his tenure of office and presence in the delegation, the country of his origin might

appear as plaintiff or defendant before the delegation. In order to ensure the largest measure of impartiality he proposed to insert after the words "the country which appointed him" the clause "or of which he is a *ressortissant.*" The proposition was immediately accepted and appears in the final text.

The third paragraph of Article 6 permits the delegation, as composed at the time of the submission of a case, to sit until the case has been disposed of, even though the year of their appointment shall have expired. It is admitted that this provision can be questioned in theory, as was pointed out by the president of the committee, because it might happen that two delegations would be sitting, at least for a while, at one and the same time. But the authors of the project took council of practice and fortified themselves by the maxim *interest reipublicae ut sit finis litium.* The submission of a partially decided case to new judges might prolong a decision indefinitely, and theory may well yield to practice to subserve the interest of justice.

Another reason for the extension in question arises from the fact that the matters submitted to the delegation are of a nature to be rapidly decided, and that the theoretical difficulty is likely to be the exception instead of the rule.

His Excellency Mr. ASSER felt that the period of a year was too short, and that the difficulty would be overcome by lengthening the term. The authors of the project opposed this suggestion, and their views were set forth by Mr. KRIEGE as follows: [1]

> The judges will hold in the special commission a very peculiar position and their functions will be of a very delicate nature. The Court must therefore be given opportunity to form an estimate of their respective industry and

[1] See vol. ii, First Commission, first subcommission, committee B, sixth meeting.

> fitness, and the facility of replacing them within a comparatively short period. If any member stands the test, the Court may, by reelecting him, avail itself of his experience. . . .
>
> The authors of the project thought it advisable to enable eminent and busy men to serve on the commission without relinquishing their high positions at home, which would undoubtedly be the case if they had to occupy their seats for more than one year.

The purpose of the provision in question was to present a ready means of settling a difficulty by providing a small body of judges to which it could be presented and decided. The proceeding is therefore in the nature of a summary proceeding and, the designation being for a year, would permit a small delegation of trained judges on permanent session during the course of the year to receive and decide any cases presented. At the same time the limitations of their mandate would prevent them from constituting themselves in permanence and creating within the Court an institution which might compete with it.

The reason advanced by Mr. KRIEGE that jurists of recognized ability might be willing to serve on the committee for a year, whereas it might be impossible for them to serve on it for a longer time, seemed a sufficient reason why the mandate should not be extended beyond a year. The possibility
[366] of reelection would in itself seem to meet the objection of his Excellency Mr. ASSER.

ARTICLE 7

A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties.

A judge can not act as agent or advocate before the Court of Arbitral

Justice, the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act for one of the parties in any capacity whatsoever so long as his appointment lasts.

The project in all its parts looks to the impartial administration of justice, for partiality is as unpardonable and objectionable in an international as in a municipal court, and the authors of the project devoted themselves with singleness of purpose to secure and safeguard that impartiality, without which an international court would be without business as it would be without respect.

To secure this impartiality and to prevent even the breath of suspicion, the judge of the Court of Arbitral Justice is forbidden to take part in the decision of the case, if he has officiated as a judge in its former disposition. If the case was originally decided in a national tribunal of which the international judge was at that time a member, or if he sat as arbitrator in a tribunal of arbitration, or if he was a member of a commission of inquiry which found the facts, or, finally, if he had been previously employed as counsel or advocate of one of the parties in the decision of the case which is submitted to the determination of the Court of Arbitral Justice, it seems indispensable in the interest of justice that such a judge, considering his judicial antecedents, should not be permitted to take part in the decision of the case in the Court of Arbitral Justice. Human nature is prone to justify itself, and experience shows that judges are not wholly free from the frailties of mankind. It is not intimated that a judge in the performance of his official duties would be influenced by his previous conduct and decision, but the fear that he might be influenced is sufficient in itself to disqualify him from taking part in the decision of the case. It may be that a judge so placed would strain a point not to be influenced, and, if so, such conduct would be detrimental to the interests of the parties. It there-

fore seems advisable to remove him from all possibility of criticism, and by so doing perform a service to him as well as create confidence in the Court.

Respect for the position and situation of the judge requires that he shall not appear during the tenure of his office as agent or advocate before the Court of Arbitral Justice. As there is established an intimate relation between the new Court and the Permanent Court of Arbitration, it was likewise thought advisable to prevent his appearance in any capacity before this august tribunal. The objection to his officiating as advocate or agent before a special tribunal of arbitration is not perhaps so cogent, nor is his exclusion from a commission of inquiry justified by the same imperious necessity, but the duties of agent and advocate are so incompatible with the calm and poise of a judge that it seems advisable, in the interests alike of judge and Court, to prevent him from uniting in his person these differences and at times incompatible qualities.

The foregoing prohibitions would seem adequately to cover the subject, but in order to prevent indirectly the performance of duties incompatible with judicial impartiality, the [367] authors of the project forbade the judge "to act for a litigant, in any capacity whatsoever, during his tenure of office."

This latter clause would prevent him from giving advice and counsel to parties litigant, even though he did not appear as agent or advocate. It seems, therefore, that the judge is to devote himself to his judicial duties with singleness of purpose during his entire term, and the possibility of his being interested, either directly or indirectly, in any capacity other than that of judge is excluded by the express wording of the article.

It should be added that the provisions of the article in its present form were adopted by the committee without observation.

The original text of the first paragraph of the foregoing article was as follows:

> In no case, unless with the express consent of the parties in dispute, can a judge participate in the examination or discussion of a case pending before the International High Court of Justice when the Power which has appointed him is one of the parties.

The presence or absence of subjects or citizens upon the Court, when their country of origin is a party to the proceeding before it, gave rise within and without the committee to grave discussion and reflection. It is familiar doctrine that a man should not be judge and advocate in his own cause, and this provision obtains in all systems of national jurisprudence. The purpose of the American delegation in proposing the establishment of the new Court, composed of judges, was to secure not approximate but that absolute justice which obtains in a highly organized and well-regulated court of justice. It did not mean to question the impartiality of nationals. It meant to remove from them any suspicion of partiality which might arise if they passed judgment upon a case in which their own country or the country appointing them was involved or interested. The American delegation therefore wished to exclude from the proposed Court an American judge, supposing he was a member of the Court at the time when an American case was submitted, and to leave the decision of the Court solely to the foreign judges.

In this view the British delegation concurred.

The German delegation, however, felt that the presence of a national upon the Court at such a time would be a guaranty that the national view would be carefully presented to the judges in chamber, and that the assistance of such a one in drawing up the final judgment would be an advantage both from his familiarity with national jurisprudence and from his

desire to prevent the formulation of the judgment in such a way as might seem to reflect, unwittingly or improperly, upon the nation of which he is the appointee.

These arguments are of themselves convincing, unless their realization should affect the question of impartiality. In a small court the presence of a national might cast a suspicion of partiality, as is the case with small tribunals of arbitration, where the struggle of each party is supposed to be to win over the umpire. In a large court, however, the difficulty of convincing a majority would be so great that the suspicion of partiality could not easily arise. The proposition, therefore, of the German delegation, that nationals should sit in cases in which their respective countries were involved, was accepted by the American and British delegations.

A strong and convincing argument for the German [368] amendment lies in the fact that the Court sought to be created is an International Court, and that its jurisdiction depends upon general or special agreements of arbitration. The essence of arbitration consists in the free choice of judges. It would seem unwise to exclude nationals unless the reasons for their exclusion was overwhelming. The resort to arbitration should not be discredited, and the desire of its friends should be to cure the defects rather than to kill the system. As, therefore, the presence of nationals in a large court is unlikely to impair its usefulness, and possesses, on the contrary, the advantages mentioned in the German amendment, the amendment was unanimously adopted by the committee of examination.

The amendment proposed and accepted has the advantage not merely of meeting a general desire but of carrying out a suggestion made by the Russian Government in 1899, for the constitution of a tribunal of arbitration, of which the third section is as follows:

> If one or more Powers among those in litigation are not represented upon the arbitral tribunal . . . each of the two parties in litigation shall have the right to be represented thereon by a person of its own choice acting as judge and having the same rights as the other members of the tribunal.

The presence of nationals within the Court is important from another point of view, namely, because its decision is not limited in its effect to the nations in controversy. It affects international law as a whole, and the nations should not be disqualified, merely because their respective countries are parties litigant, from contributing to and influencing the development of international law.

Article 8

Every three years the Court elects its president and vice president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are even, by lot.

The provisions of this article, short and simple as it is, are yet of fundamental importance, for it means that the Court is to choose its own officers by ballot without dictation. The president is not to be imposed upon the Court, neither is he to be selected by an alphabetical arrangement nor by lot. The Court itself is to determine the qualities it prefers in a president, and elect as presiding officer the one who possesses those qualities.

The vice president is likewise selected by the Court, and as he is to preside in the absence of the president, it is to be supposed that he will possess the qualifications in as eminent a degree as the president himself.

As the selection of these officers is of vital importance, the article provides that the election shall result from an absolute

majority of the members of the Court on the second ballot. Should no candidate receive this absolute majority, plurality will suffice to elect; and if opposing candidates should receive an equal number of votes, lot will decide between them. It is unlikely that all these methods of election and selection will be resorted to, but it seemed advisable to specify them in the article for the sake of completeness. A difficulty inevitably exists in the case of a tied vote, which can be easily met by drawing lots, even though there are other methods. For example, the senior judge in date of service, as evidenced by his oath of office, might be declared elected. What shall be done, however, if the two candidates in question took oath on the same day? In such a case the age of the respective candidates might be considered, as wisdom and experience are supposed to come with age. The committee seemed to prefer [369] this mode of selection, and the last paragraph of the article was directed to be modified in this sense. The committee of examination, however, did not find the reasoning convincing, and on second reading the article was adopted as stated above.

It will be noted that the president and vice president are selected for a period of three years. This period is in its nature arbitrary. It was felt that the Court should have the benefit of the experience obtained by the presiding officers in the performance of their judicial duties, and that this experience might be lost if an election took place every year. If a presiding officer prove himself competent and equal to his duties, he can be reelected. Should he fail to meet the expectations of the Court, another may be selected in his place. To the authors of the project less than three years seemed too short. More than three years might prove an embarrassment in the highly improbable event that the presiding officer failed to command the confidence of his colleagues.

ARTICLE 9

The judges of the Court of Arbitral Justice receive an annual salary of 6,000 Netherland florins. This salary is paid at the end of each half year, reckoned from the date on which the Court meets for the first time.

In the exercise of their duties during the sessions or in the special cases covered by the present Convention, they receive the sum of 100 florins, *per diem*. They are further entitled to receive a traveling allowance fixed in accordance with regulations existing in their own country. The provisions of the present paragraph are applicable also to a deputy judge when acting for a judge.

These emoluments are included in the general expenses of the Court dealt with in Article 31, and are paid through the International Bureau created by the Convention of July 29, 1899.

In the original text the salaries of the judges, as well as the additional compensation to be received by them for the performance of their professional duties at The Hague, were omitted. In other respects the final wording differs only in matters of style from the original form.

Let us consider each paragraph in turn.

It was felt advisable that the judges of the Court of Arbitral Justice should receive an annual salary of 6,000 Dutch florins, for the reason that, as judges, they may be called at any time to officiate at The Hague, and that some specific allowance should be made for the services that they stand ready to render. The allowance is admittedly out of proportion to the services it is expected they will perform, but if a modest compensation is open to difficulty and criticism, the committee felt that a larger amount would be open to greater and more serious objections.

If the honorarium be the attraction, rather than the dignity and the nature of the employment, it is possible that politics rather than fitness might enter into the selection. An advocate with a large practice could not be expected to absent himself for long periods; but a judge of fine qualities, rather

than a successful advocate, is required for the Court of Arbitral Justice. As jurists rather than practitioners are to be selected, it will not appear that this compensation, modest as it is, is to be despised. If it be borne in mind that the judge does not, at least at present, need to reside permanently at The Hague, and may therefore follow his profession or calling in his own country, it will be seen that the compensation, small as it may seem, is not the sole source of his income; it [370] is additional to it, and therefore is not so insignificant as it would appear at first sight.

The honorarium is, according to this article, to be paid semi-annually, to date from the first meeting of the Court.

There is a further provision that the judges in active service shall receive an additional sum to cover expenses during the official residence at The Hague. This allowance, while not generous, seems adequate, and it was felt by the committee that 100 florins a day would cover the ordinary expenses to which a judge would be subjected.

But as the judges are to be taken from all parts of the world, it is obviously unjust that they should pay their traveling expenses to and from the Court. Were this so, in many cases the position of judge might become a burden, and would entail not merely sacrifice of professional employment, but the additional outlay for necessary and incidental traveling expenses. The committee deemed it inadvisible to fix any rate of mileage. The provisions of each country in the matter of traveling allowances seemed, on the whole, the fairest standard.

While these dispositions relate principally to titular judges of the Court, the deputies, while acting as judges, are clearly entitled to equality of treatment. But there is this difference, that the titular judges receive a fixed salary while the deputies only receive traveling expenses and the daily allowance of 100 florins while engaged in the trial of cases.

In the original text the various sums mentioned were to be borne by the signatory Powers, according to the proportion established for the Bureau of the Universal Postal Union, whereas in the final form the general expenses of the Court are to be paid by the International Bureau, according to the subsequent agreement of the signatory Powers.

ARTICLE 10

The judges may not accept from their own Government or from that of any other Power any remuneration for services connected with their duties in their capacity of members of the Court.

The purpose of this article, like that of so many others in this project, is to safeguard in the largest possible manner the impartiality of the judges, and to protect them, directly and indirectly, from the slightest charge or suspicion which would reflect upon their honor or freedom and therefore upon their impartiality.

Article 9 provided that the judge should receive compensation at the hands of the signatory Powers. Article 10 provides that he shall receive a salary for the performance of judicial duties solely from the Powers, and that neither directly nor indirectly shall he receive compensation from the home Government for the performance of his judicial duties. If he be a magistrate, if he be an officer of the State or a professor in a university under State control, he is in a certain sense supported by the State, but the salary received is of quite a different origin and is distinct from that received by him as judge of the Court of Arbitral Justice. In the same manner it is provided that the judge shall not receive compensation from any other Power, whether it be in the form of payment or in the more insidious form of gift; for either method would necessarily carry with it the idea of reward for past services, which idea is inconsistent with equal, exact, and impartial justice.

The provisions of this article apply not merely to services rendered in the Court, but to any services in any other judicial capacity in accordance with the provisions of the project, such as membership in the delegation, membership in a commission of inquiry, etc.

[371] ARTICLE 11

The seat of the Court of Arbitral Justice is at The Hague, and can not be transferred, unless absolutely obliged by circumstances, elsewhere.

The delegation (Article 6) may choose, with the assent of the parties concerned, another site for its meetings, if special circumstances render such a step necessary.

This article looks to the physical permanence, as it were, of the Court. It is not enough that the judges be selected and definitely known; the Court itself must meet at a certain time and in an ascertained place. That place, by general agreement, is The Hague. The reasonableness of this provision was such as to secure its unanimous acceptance without discussion.

As the purpose of the delegation is different from that of the Court, it seems to follow that the provisions concerning it might differ. Such is the case, for it is provided that the delegation may, with the assent of the parties litigant before it, choose another place for its meetings if special circumstances require it. The reason for this is that the delegation is meant to be a small, specially composed body, formed out of the general court and representing it in small matters. Its membership is purposely small, so that the business before it may be rapidly transacted.

It is likewise purposely small, so that it may be enlarged to meet the requirements of a particular case; and Article 20 permits either party litigant to designate a judge of the general Court to sit with the delegation. If the delegation, as it seems

probable or at least possible, acts as a commission of inquiry, then each party in controversy has the right to add a member chosen within or without the Court. If it be used for a trifling dispute, and if its presence in a place other than The Hague seems advantageous to the litigants, then its place of meeting may be changed upon request and agreement of the parties. If it sits as a commission of inquiry, that is to say, for the finding of the fact rather than the discovery or application of a principle of law, freedom is left it to meet, upon request of the parties, where the facts in dispute and the evidence to support them may be most readily ascertained or procured.

In considering the question of the use of the delegation for purposes of commissions of inquiry, his Excellency Mr. EYSCHEN asked if the delegation were required to act, upon request, as a commission of inquiry. The question involved is of fundamental importance and was considered by the committee in its larger aspect, namely, whether or not the judges of the Court are obliged to exercise judicial functions as commissioners of inquiry, or in any other capacity for which they may be requested. The obligation to serve seems to rise from the very nature of the case, for the judge is appointed, takes the oath, and receives the compensation allowed by Article 9, on condition that he fulfill the duties of his high office. It would seem that the obligation of the judge to exercise his judicial functions in accordance with the terms of his mandate is so formal and so manifest as to make it useless to stipulate it expressly.

It is indeed true that the judges of the Permanent Court of Arbitration are not obliged to serve, but the judges of the new Court of Arbitral Justice are salaried officials. His Excellency Mr. MARTENS considered the matter of very grave importance,[1]

[1] See vol. ii, First Commission, first subcommission, committee of examination B, fourth meeting.

as it seems to imply the right of the judges to refuse to perform their judicial duties. He recalled the fact that the Powers quite frequently, for one reason or another, met [372] refusals from members of the Permanent Court whom they had approached. No one is compelled to accept appointment to the Court, but from the moment that the position is accepted the obligation must be discharged; its duties may not be evaded by any one. His Excellency Mr. MARTENS further pointed out the necessity of making, by positive stipulation, the members of the Court independent of their Governments. Without such precaution a State could easily, on political grounds, reprove a judge, over whom it has jurisdiction, for accepting the office of judge in such or such a case.

The president of the committee answered that it was clear that the judges of the new Court were to be salaried officers of the international judiciary; that unless lawfully challenged they will be bound to sit in judgment; that the necessity for a new text is not apparent; that it would be sufficient to define in the report the character of the functions and the obligations therein involved, and to mention in the minutes the remarks made and the agreement reached in the committee in that respect.

The committee was satisfied with the explanation given, and it does not seem advisable to state in positive or express terms a duty incumbent upon a judge by the very nature of his appointment and acceptance of office.

ARTICLE 12

The Administrative Council fulfils with regard to the Court of Arbitral Justice the same functions as to the Permanent Court of Arbitration.

The provisions of this article seem to require neither comment nor explanation, for it is a further indication of the nec-

essary and close relation between the proposed Court and the Permanent Court of Arbitration.

ARTICLE 13

The International Bureau acts as registry to the Court of Arbitral Justice and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The secretary general of the Bureau discharges the functions of registrar.

The necessary secretaries to assist the registrar, translators and shorthand writers are appointed and sworn in by the Court.

The original text is as follows:[1]

> The International Bureau of the Permanent Court of Arbitration acts as registry to the International High Court of Justice. It has charge of the archives and carries out the administrative work.

It will be seen that its scope is somewhat enlarged and completed in the final wording. In either form the article is another example of the close and necessary connection between the two Courts. For just as the Administrative Council is common to both Courts, the International Bureau is likewise at the service of both. It is the clerk's office for the proposed Court, and places at its disposition its quarters and staff. It has the custody of the archives and the supervision of administrative duties. In addition, the secretary general of the International Bureau acts as clerk of the proposed Court.

The third paragraph is new and is based upon the discussion and the revised provisions for the commissions of inquiry and the International Prize Court. The experience of the last few years has shown the necessity of translators and the difficulty of securing them. In the same way, the presence

[1] See vol. ii, First Commission, annex 80, Article 13.

[373] of stenographers is essential to the prompt administration of business. It was thought advisable to provide in express terms that these functionaries should be designated by the Court and that they should take oath of office or solemn affirmation before the Court for the faithful performance of their duties. By these provisions, trifling as they may seem, it is hoped that the delay and difficulty experienced in the past will be obviated.

ARTICLE 14

The Court meets in session once a year. The session opens the third Wednesday in June and lasts until all the business on the agenda has been transacted.

The Court does not meet in session if the delegation considers that such meeting is unnecessary. However, when a Power is party in a case actually pending before the Court, the pleadings in which are closed, or about to be closed, it may insist that the session should be held.

When necessary, the delegation may summon the Court in extraordinary session.

The phraseology of this article has undergone, at the hands of the committee, considerable modification and very great improvement. In its original form [1] it was as follows:

> The High Court shall meet in session once and, if necessary, twice a year. The sessions shall open the third Wednesday in July and the third Wednesday in January, and shall last until all the business on the agenda has been transacted.
>
> The sessions shall not take place if the special committee decides that business does not require it.

The provisions of this article are important, for they affect in a large measure the permanency as well as the impartiality

[1] See vol. ii, First Commission, annex 80, Article 14.

of the Court, that is to say, the two fundamental and controlling ideas of the authors of the project.

In proposing that the Court be established in permanence, the American delegation had in mind the necessary corollary, that the judges should themselves reside at The Hague, ready at any time to undertake the important duties which might be confided to them. It was objected that residence at The Hague would practically denationalize the judge, an objection which failed to impress the American delegation, whose great desire was to free judicial decision from national bias. It was further suggested that continued residence at The Hague would detract from the dignity of the Court and be embarrassing to the judges to be in permanence, if few or no cases should be presented in the first months or years of its establishment. The reply to that was and is, as indicated by their Excellencies Mr. CHOATE and Baron MARSCHALL VON BIERBERSTEIN, that the foreign offices of the signatory Powers are burdened with the weight of international cases awaiting final disposition, and that if the Court were established, the signatory Powers would vie with each other in presenting cases to it. Indeed the fear of Baron MARSCHALL was that the Court would be overworked at the beginning of its career. Mr. CHOATE called attention to the fact that in the first years of the existence of the Supreme Court of the United States there was little or no litigation before it, that it frequently adjourned for lack of business, and that it was only as the Court established itself in confidence that business flocked to it. There was, therefore, no reason to prevent the Court of Arbitral Justice from being in permanence, as the Supreme Court has been, ready to receive the cases presented to it.

Another view may be mentioned, namely, that of his Excellency Mr. ASSER, who believed that most matters would be presented to and decided by the delegation, so that it was a matter

of comparative indifference how often the Court met or how long it remained in session. This view failed to commend itself to the authors of the project, whose intention was not to entrust a small committee with the decision of international conflicts of grave importance, but to reserve them for [374] the enlightened and profound consideration of a court adequately representing and versed in the various judicial systems of the world.

It was finally agreed that the Court should meet at least once a year, and that it should remain in session until the cases properly presented and ripe for decision should be decided. The date of meeting, necessarily arbitrary, was set for the month of June, and as nearly as possible to the opening of the Second Conference.

In order to prevent a session of the Court without cases for its consideration, the second paragraph authorized the delegation to inform the judges that there was no case awaiting their decision, and thus prevent the expenses incident to the assembling of the Court. This provision, wise in itself, seemed open to criticism because it placed the Court under the control of the delegation, instead of placing the delegation under the control of the Court. This objection was admirably stated by his Excellency Count TORNIELLI in the following language: [1]

> If the commission may decide that the business does not require the convocation of the Court, it may well happen that certain cases will remain in abeyance. This power of the commission seems arbitrary.

It was suggested that the Court might frame a rule for such a case, but the committee hesitated to invest the Court with a power whose exercise might eventually imperil the usefulness

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[1] See vol. ii, First Commission, first subcommission, committee of examination B, sixth meeting.

of the institution. The president [Mr. BOURGEOIS] proposed the following amendment: "The session shall not take place if the commission decides that there is no business ready for submission." The proposed restatement of the article was satisfactory to his Excellency Count TORNIELLI. The committee of examination, to which the matter was referred, accepted the principle and strengthened it by making the calling of the Court obligatory, if a signatory and litigating Power requested the convocation of the Court. The wording as adopted was as follows:

> However, when a Power is party in a case actually pending before the Court, the pleadings in which are closed or about to be closed, it may insist that the session should be held.

The amendment as proposed and accepted was not intended to deprive the delegation of its rights to call the Court into session, but solely to remove from the delegation the power to prevent the Court from assembling, if its convocation be desired by a party to the controversy. In order to avoid all misinterpretation, the final paragraph of the article confers in express terms this right upon the delegation in the following language: "When necessary, the delegation may summon the Court in extraordinary session."

It is thus that Article 14 in its present form is a compromise based upon an exchange of views within the committee. One view would have had the Court permanently in session; another view would only have the Court summoned when the delegation considered that the business was ripe for determination. The compromise consisted in making the sessions of the Court depend upon the expressed will of the parties litigant, with the happy result of avoiding extremes, which, in matters of judgment and discretion, are doubly dangerous.

ARTICLE 15

A report of the doings of the Court shall be drawn up every year by the delegation. This report shall be forwarded to the contracting Powers through the International Bureau. It shall also be communicated to the judges and deputy judges of the Court.

[375] This article, which did not appear in the original project, was added at the request of the committee. As originally drafted it provided that [1]

> The special commission shall submit to the Administrative Council an annual report upon the labors of the Court. The said report shall be communicated to all the judges and deputy judges of the Court.

The first sentence requires that an account of the proceedings (*compte rendu*) of the Court shall be prepared annually by the delegation, setting forth the work of the Court as well as that of the delegation.

But the *compte rendu* has an importance and interest far transcending its communication to the Court. The judgments of the delegation will effect not merely the immediate parties in controversy, but will be of profound interest to the signatory Powers at large. Therefore it seemed indispensable that the *compte rendu* should be transmitted to the signatory Powers by the Administrative Council.

His Excellency Mr. MARTENS felt that the original wording of the article, namely, that a report be presented to the Administrative Council, was open to objection, because the duty might seem to involve the relation of superior and inferior, which appeared to him unwise to establish. He further feared that this course might seem to confer upon the Administrative

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[1] See vol. ii, First Commission, first subcommission, committee of examination B, sixth meeting.

Council the right of examination and criticism, whereas, in his view, the Administrative Council should confine itself solely to transmitting the report without criticism or comment.

In order, therefore, to meet these objections, the committee of examination decided to substitute the International Bureau for the Administrative Council as the medium of transmission, and by the use of the expression *compte rendu* instead of the word "report" to make the performance of the duty simply clerical. It was further decided that the *compte rendu* in question should be communicated to the judges and to the deputy judges of the Court.

ARTICLE 16

The judges and deputy judges, members of the Court of Arbitral Justice, can also exercise the functions of judge and deputy judge in the International Prize Court.

In the original project this article appeared provisionally as follows:

ARTICLE 15

Provisions respecting the relations of the International High Court of Justice with the International Prize Court, especially as regards holding office as judge in both Courts.

It was intended by the authors of the project to establish between the proposed Prize Court (now fortunately adopted by the Conference) and the present proposed Court the close relations which exist between the Permanent Court and the proposed Court of Arbitral Justice by permitting the judges of the Court of Arbitral Justice to act as judges in the Prize Court. The purpose of the project was not to subordinate either Court to the other, but to indicate to the Powers the possibility, indeed the advisability, that the judges of the Court of Arbitral

Justice should possess the qualifications fitting them for judges of the Prize Court.

The articles already discussed deal exclusively with the organization of the Court of Arbitral Justice and suggest only incidental questions of jurisdiction. The second title of the project deals with the competence and procedure of the proposed Court, and is therefore of the highest importance. The organization is, as it were, the covering; the competence and procedure are the essence.

[376] PART II.—*Competency and procedure*

ARTICLE 17

The Court of Arbitral Justice is competent to deal with all cases submitted to it, in virtue either of a general undertaking to have recourse to arbitration or of a special agreement.

The original text of this article was as follows: [1]

ARTICLE 16

The International High Court of Justice shall be competent:

1. To deal with all cases of arbitration which, by virtue of a general treaty concluded before the ratification of this Convention, would be submitted to the Permanent Court of Arbitration unless one of the parties objects thereto.

2. To deal with all cases of arbitration which, in virtue of a general treaty or special agreement, are submitted to it.

Proposition of the German and American delegations

3. To revise awards of tribunals of arbitration and reports of commissions of inquiry, as well as to fix the rights

[1] See vol. ii, First Commission, annex 80, Article 16.

and duties flowing therefrom, in all cases where, in virtue of a general treaty or special agreement, the parties address the High Court for this purpose.

The original text shows that a marked difference of opinion existed among the authors of the project, and it is therefore not astonishing that a like divergence of view should manifest itself in the committee.

The authors of the project intended to give the widest liberty to the parties to choose between the two Courts, and therefore provided that a case of arbitration arising under a general treaty of arbitration, concluded before the ratification of the Convention establishing the Court, might be submitted to the Court for determination, unless the other party to the controversy opposed.

The second paragraph made the Court competent to consider all cases of arbitration presented to it by virtue of a general treaty or of a special agreement.

The third paragraph sought to specify in detail the various matters which might come before the Court by virtue of a general treaty or special agreement, by providing that the awards of tribunals of arbitration and reports of commissions of inquiry might be, upon the express agreement of the parties, submitted to the Court for review.

As regards the reports of commissions of inquiry, the delegations of Germany and the United States of America were inspired by the amendments proposed by Russia to the Convention relating to commissions of inquiry, as it seemed not improbable that parties in controversy might wish to submit the findings of a commission of inquiry to a judicial tribunal in order that the rights and duties arising from the facts found by the commission of inquiry might be determined in a judicial proceeding.

[377] It should be said, however, that the delegation of Great Britain believed it inadvisable and unnecessary to express this eventuality in an article, because, as the submission of the Court would arise solely by voluntary agreement of the parties in controversy, it deemed it unnecessary to stipulate in an article that the parties could do specifically what they were generally empowered to do. The delegations of Germany and the United States felt that the special article would remove any doubt as to the jurisdiction of the tribunal to entertain such controversies, and that therefore the paragraph would subserve a highly useful purpose.

The opposition to the article as originally framed was led by his Excellency Mr. FUSINATO,[1] who observed that paragraph 1 of Article 16 created a presumption in favor of the new Court, and expressed the opinion that a convention could not be modified without the consent of the parties. "It is not enough," he said, "to grant the parties the right to object. It would therefore be desirable to add to the paragraph the proviso that it would be with the 'express assent of the parties.' But if so modified, paragraph 1 becomes useless, as the case contemplated by it is already provided for in paragraph 2 of the same article."

As to paragraph 3 of the article, Mr. FUSINATO remarked that, as a rule, revision can only take place before the judge who pronounced the sentence, so that the recourse contemplated in paragraph 3 would not be a revision, but a judgment on appeal or annulment. If the parties agree to resort to the new Court under the conditions set forth in paragraph 3, they certainly may do so; but this case comes within the general provision of paragraph 2; and paragraph 3 should therefore be suppressed.

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[1] See vol. ii, First Commission, first subcommission, committee of examination B, third meeting.

In regard to the objection to the first paragraph of the original draft, it is sufficient to say that the committee shared Mr. FUSINATO's view, and was unwilling to create, directly or indirectly, a presumption in favor of the proposed Court. As remarked by Professor RENAULT, if the new Court won universal approbation, it could only be by reason of its merits and its advantages.

As the competency of the Court is solely to depend upon the express assent of the parties, it follows that the distinction between paragraphs 1 and 2 of the original text falls and is no longer necessary. The committee therefore decided to suppress the first paragraph. The second paragraph, based as it is upon the express agreement of the parties, was unanimously accepted.

It was, however, suggested that the word "general," qualifying "treaty," should be omitted, but that the phrase "special agreement," accompanying it, be retained. Mr. RENAULT explained that the antithesis between the two expressions would indicate that in the first case the controversy could be submitted to arbitration under the general treaty of arbitration or of a general clause of arbitration contained in the treaty; whereas the phrase "special agreement" would refer to an agreement of the parties to submit a special controversy to the Court, whether bound or not to do so by an antecedent treaty. He therefore proposed the following happy formula: "by virtue of a stipulation to arbitrate or of an agreement to arbitrate." The committee adopted the principle and embodied it in the final text of the article in the following form:

> The Court of Arbitral Justice is competent to deal with all cases submitted to it, by virtue of a general stipulation to arbitrate, or of a special agreement.

The third paragraph of the original draft gave rise to animated discussion and searching criticism.

The difficulty in the matter of revision arises, as was pointed out by Mr. FUSINATO, from the possible confusion between "revision" in the strict sense of the word and "appeal." Now "revision" implies, indeed presupposes, in general a reexamination before the tribunal or judge pronouncing the [378] original decision, as appears from Article 55 of the Convention of 1899, which permits the parties litigant to reserve in the *compromis* the right to demand the revision of the arbitral award. By virtue of this article the revision proceeds from the express agreement of the parties. The right of revision exists because it is expressly reserved. If, therefore, the parties agree to invest the new Court with jurisdiction of the cases contemplated by paragraph 3 of the original draft, they may assuredly do so. In such a case the submission to the Court would arise solely from the "special agreement," that is to say, from the express will of the parties. Viewed in this light, the reason for the separate existence of the paragraph fails and the committee decided to suppress paragraph 3, with the distinct understanding, however, that the "special agreement" referred to in paragraph 2 permits revision by the Court of Arbitral Justice.

ARTICLE 18

The delegation (Article 6) is competent:

1. To decide the arbitrations referred to in the preceding article, if the parties concerned are agreed that the summary procedure, laid down in Part . . . of the revised Convention of July 29, 1899, is to be applied;

2. To hold an inquiry under and in accordance with Part III of the Convention of July 29, 1899, in so far as the delegation is entrusted with such inquiry by the parties at issue acting in common agreement. With the assent of the parties concerned, and as an exception to Article 7, paragraph 1, the members of the delegation who have taken part in the inquiry may sit as judges, if the case in dispute becomes the subject of arbitration, either by the Court, or the delegation itself.

Article 17 dealt with the general jurisdiction of the Court of Arbitral Justice. Article 18 deals with the limited jurisdiction of the delegation.

In the first place, the delegation is clothed with jurisdiction to consider the cases enumerated in the preceding article, if the parties agree to the "summary proceeding." An examination of the French proposal to that effect shows that it aims solely to provide a court ready at all times for the trial of questions of trifling importance. The machinery for the selection of judges created by the Convention of 1899 is slow and cumbersome, and in small cases it seems unlikely that litigants will resort to it. The French delegation therefore proposed an easier and quicker method to constitute the Court and to decide the case submitted with the least possible delay. For this reason the proceedings before the Court are to be written, not oral, although the testimony of the witnesses or experts is permitted, and the tribunal possesses the right to summon them in accordance with the provisions of the following article.[1]

> The proceedings are conducted exclusively in writing. Each party, however, is entitled to demand the *appearance* of witnesses and *experts*. The tribunal has, for its part, the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in Court it may consider useful.

The French proposition does not sacrifice care and deliberation to rapidity of procedure, but lays stress upon the fact that it is often more important to settle small matters rapidly than to subject them to the careful, and therefore protracted, examination of a large tribunal.

The first sentence of the second paragraph is the same as in the original text, with the exception of some purely formal

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[1] See vol. ii, First Commission, annex 9.

changes. Its object is to make the delegation competent
[379] to sit as a commission of inquiry if chosen by the parties for such a purpose. This provision is not intended by any means to create a prerogative; it is competent only if chosen by the parties.

Such at least was the opinion of the authors of the project, but the Austro-Hungarian delegation moved to withdraw the competency from the Court. Professor LAMMASCH recalled the distinction made in 1899 between the commission of inquiry and the Arbitral Court, and declared that in his opinion the two were incompatible. One answer to this objection is that there does not seem to be any reason why the delegation should be incompetent if the parties wished it to act, because judges trained in weighing and sifting evidence for the sole purpose of ascertaining the facts of a case would be peculiarly qualified for commissioners of inquiry. The fact that each litigant party might add a member to the delegation (Article 20), who would probably be a technical expert, shows clearly that the delegation when sitting as a commission of inquiry would not act as a court. There would seem, therefore, to be no reason to prevent the delegation from acting as a commission of inquiry. This reasoning did not, however, convince Mr. LAMMASCH, who admitted that the members of the delegation might properly act as commissioners if chosen, but insisted that the delegation would be tempted to act as a judicial tribunal rather than as a finder of facts.

The president [Mr. BOURGEOIS] pointed out that inasmuch as Article 10 of the project relating to commissions of inquiry provided that the parties should have absolute freedom in composing the commission, it seemed difficult to prevent them from applying to the delegation. It is obvious that the spirit of the commission of inquiry must not be confounded with that of the Court, but if the purpose be to restrict the functions

of the judges, it should be so stated in express terms. The difficulty was solved by a vote of the committee for the maintenance of the article as proposed.

It therefore being decided that the delegation could act as a commission of inquiry, if requested by the parties litigant, the question was raised and discussed whether the members of the delegation should receive extra compensation for such services. His Excellency Mr. ASSER felt that they should, but his Excellency Mr. CHOATE, by a comparison of Articles 17 and 20 of the project, demonstrated conclusively that only members of the commission of inquiry not chosen from the judges of the Court should receive special remuneration, whereas, on the other hand, no special compensation should be allowed to the members of the Court.

As pointed out by Mr. RENAULT, paragraph 2 of Article 8 is decisive, because it allows a certain sum to the judges of the Court during the session or the performance of their duties created by the Convention. For a like reason the traveling expenses should be allowed if members of the delegation are obliged to sit elsewhere than at The Hague. His Excellency the president of the Conference, Mr. NELIDOW, remarked that these allowances were included in the costs of the case, and that it was only necessary to mention this fact in the report and minutes.

The committee thereupon dropped further consideration of the subject and took up the question of the special jurisdiction with which the delegation should be vested.

The intention of the authors of the project in creating the delegation was to have ready and at hand a small body capable of enlargement and modification in order to decide speedily and with judicial certainty questions of lesser importance. His Excellency Mr. ASSER advanced the opinion that to limit the jurisdiction of the delegation was tantamount to restricting

the choice of the parties, because if they preferred to apply to the delegation, upon what grounds may its competency be denied? The answer would seem to be twofold: the first answer to Mr. ASSER[1] was that the American delegation [380] could not accept his proposition. Desiring the establishment of a court of justice, not a special committee to be endowed with the same powers and jurisdiction as the Court, it therefore must reject a provision which would strip the Court of all its authority and leave it nothing but the annual election of the three members of the delegation.

A stronger and more convincing reply was made by Mr. CROWE, who said:[2]

> While Article 18, paragraph 1, does restrict the freedom of parties, it is in the interest of the Court itself. The Court's decisions are destined, in the author's opinion, to create a jurisprudence and gradually to develop international law. I therefore think it very unwise to endanger the authority of its decision by permitting a small committee of three members to pass upon questions of fundamental importance.

The president summarized the debate as follows:[3]

> The question now raised is that of the character to be given the jurisdiction of the delegation. Shall its jurisdiction be limited to certain matters or should we assign to it general functions? The authors of the draft think that this latter theory is dangerous; I share their opinion; it is necessary here to proceed with prudence and to postpone increasing the functions of the delegation; we should not risk lessening the importance of the Court at the outset.

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[1] *Actes et documents,* vol. ii, First Commission, first subcommission, committee of examination B, seventh meeting.

[2] *Ibid.*

[3] *Ibid.*

Upon reference to the committee, the motion to make the jurisdiction of the delegation coextensive with that of the Court of Arbitral Justice was negatived.

The final sentence of Article 18 is an addition to the original wording, and was added pursuant to a suggestion of Mr. RENAULT, who felt that the presence of judges familiar with the facts found by the delegation sitting as a commission of inquiry would be of great advantage either in the Court or in the delegation itself when it has to render a decision, that is to say, whenever the parties in controversy conclude a special agreement to submit the case to its final determination. The committee of examination recognized that the functions of finders of the fact and interpreters of law were so different in theory and in practice that there was no occasion to exclude the members of the delegation if the parties desired their presence. The following paragraph was therefore proposed and accepted:

> With the assent of the parties concerned, and as an exception to Article 7, paragraph 1, the members of the delegation who have taken part in the inquiry may sit as judges, if the case in dispute is submitted to the arbitration of the Court or of the delegation itself.

ARTICLE 19

The delegation is also competent to settle the *compromis* (Article 31 of the Convention of July 29, 1899) if the parties are agreed to leave it to the Court.

It is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach an understanding through the diplomatic channel, in the case of:

1. A dispute covered by a general treaty of arbitration concluded or renewed after the present convention has come into force, providing for a *compromis* in all disputes and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the delegation. Recourse can not, however, be had to the Court if the other

party declares that in its opinion the dispute does not belong to the category of questions to be submitted to obligatory arbitration, unless
[381] the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one Power by another Power as due to its *ressortissants*, and for the settlement of which the offer of arbitration has been accepted.

This arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

This article was numbered 18 in the first draft and was worded as follows:

ARTICLE 18

The special committee is also competent to settle the *compromis* (Article 31 of the Convention of July 29, 1899), if the parties are agreed to leave it to the Court.

It is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach a diplomatic agreement in the case of:

1. A dispute arising from contract debts claimed as due to the *ressortissants* of one country by the Government of another country, and for the settlement of which an offer of arbitration has been accepted.

Proposition of the German delegation

2. A dispute covered by a general treaty of arbitration providing for a *compromis* in all disputes and containing no stipulation to the contrary. Recourse cannot, however, be had to the High Court if the Government of the other country declares that in its opinion the dispute does not come within the category of questions to be submitted to obligatory arbitration.

The first two paragraphs of the original project met with little or no opposition and were adopted with the formal

change proposed by his Excellency Count TORNIELLI, namely, that the words "a diplomatic agreement" be replaced by the phrase "an agreement through diplomatic channels."

The third paragraph, providing for the formulation of the *compromis* in the matter of contract debts, was explained as follows by Mr. Scott.[1]

The proposition concerning contractual debts lays down the principle that States must not use force in collecting contractual debts, but must resort to arbitration. The enforcement of the principle depends on the *compromis,* and it is often more difficult to frame the *compromis* than to decide on arbitration. It therefore seemed advisable to entrust the formulation of the *compromis* to an impartial and neutral special committee, which would thus assist both parties and prevent a regrettable resort to armed force.

An examination of the provisions of the Convention of 1899, dealing with this matter, discloses an omission in its Article 31. If the parties fail to agree upon the *compromis,* it is not concluded. This defect we propose to remedy.

The article was reserved at the first reading in order to await the vote of the project dealing with contractual debts, but in the second reading, on September 5, the article was adopted in principle, subject to some changes in phraseology.

The proposition of the German delegation aroused perhaps greater discussion and interest than any article on the project. It will be noted that the proposal was not concurred in by the American and British delegations. The provisions of the article were thus explained and justified by the most competent authority, his Excellency Baron MARSCHALL VON BIEBERSTEIN:

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[1] See vol. ii, First Commission, first subcommission, committee of examination B, fourth meeting: Mr. SCOTT.

[382] Our proposition is conceived upon the same lines as paragraph 1, but it possesses a much more general character. The case presented is that of the parties having concluded a treaty making arbitration obligatory—either in a general way or in specific cases—and providing for the signature of a *compromis*. I may take as an example the first two articles of the treaty between the Netherlands and Denmark.

Now the following difficulty may arise: the two parties, although agreeing in equal good faith to admit that the difference between them comes within the bounds of obligation, fail to reach an agreement as to the text of the *compromis*. The situation then becomes peculiar: two Powers have erected machinery with a mutual promise to put it into operation when divided by contention. A contentious case arises and they cannot use the machinery because of their inability to agree. In such a case an obligatory arbitration, which shines on paper, vanishes in fact. This condition would be contrary not only to the great idea of obligatory arbitration, but also to the great idea which impels us to exert our best efforts in the cause of the peaceful settlement of disputes among States. Arbitration would be obligatory as long as there is no dispute, but would become optional as soon as one arises. We favor obligatory arbitration, but desire it to produce practical results. We wish to perfect it so that it will become an available reality.

In accordance with this sentiment I have the honor to offer the following proposition: if two parties agree to admit that a dispute comes within the bounds of the obligation, and if no agreement can be reached on the *compromis*, each of the parties shall have the right to demand that the *compromis* be made by the committee (delegation).

In a word, we propose the *obligatory compromis* as the complement of the *obligatory arbitration*.

His Excellency Sir EDWARD FRY briefly stated the reasons why the other two delegations did not accept the Baron's proposal. He considered it advisable to maintain the rule in paragraph 1, and not to make obligatory in one case what was optional in the other.

He further remarked that the German proposition could not in any case change the application of existing conventions and could never be applied to them. But the obligatory character of its second part is very doubtful, since it is always possible that one of the parties will declare that the principle of obligatory arbitration does not apply. This provision is apt to invite Governments to resort to falsehood by declaring that the contentious case does not come under the treaty, in order to evade the *compromis*.

His Excellency Mr. CHOATE likewise refused to accept the article in its original form.[1]

> The delegation of the United States of America (he said) cannot accept the German proposition. As a matter of fact, it deals with desperate cases in which diplomatic negotiations have failed, and only with the hypothesis of a general treaty of arbitration.
>
> Nothing like this was ever inserted in the thirty treaties that have heretofore been concluded; it has never been proposed to impose a *compromis* not accepted by both parties.
>
> You are all aware, gentlemen, of the difficulties met with in the Senate in obtaining approval of the treaties signed by the American Government. The delegation of the United States believes it is a matter of moral impossibility for it to sign at this time a convention providing for the eventual signature of the *compromis* in advance without any knowledge of its text or scope.

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[1] See vol. ii, First Commission, first subcommission, committee of examination B, fourth meeting.

[383] It will be seen from these various quotations that there was an irreconcilable difference of opinion on this subject. The American and British delegations felt that the provisions of the article could not be well applied to treaties already concluded, when the parties had no knowledge of the fact that the *compromis,* which often decides the case, might be prepared by a body over which they had no control. Its retroactive effect was therefore unacceptable, but they believed that the delegation might well be given the power to establish the *compromis* in cases of treaties concluded or renewed after the acceptance of the Convention; for if the Powers were unwilling to permit the *compromis* to be framed by the delegation, they could readily protect themselves by the insertion of a special clause in the treaty.

The German delegation, in a spirit of conciliation, took note of the criticisms, and presented, at a subsequent session, a revised text which met with the approval of the committee and was adopted. In its final form the clause is destitute of all compulsory features, and makes the power of the delegation to settle the *compromis* dependent practically upon the consent of both parties.

Turning now from the matters of form to matters of substance, it would appear that Article 19 contains two separate and distinct parts: the competence of the Court of Arbitral Justice or of the delegation to establish the *compromis* when the parties appeal to the Court for its formulation; and, secondly, the competence of the Court or delegation to frame the *compromis* upon the request of one of the parties litigant.

Concerning the first there can be no difficulty, because if the parties are agreed, there can be no reason whatever why the delegation should not perform the service requested.

The difficulty, however, in the second is very considerable, because the Court is given the power to frame the *compromis*

upon the demand of either party to the controversy. It cannot be denied, however, that the provision, not being retroactive, permits the parties to reach an agreement on the question at issue, should they so desire. The recourse to the Court is not obligatory. If they have not concluded the *compromis*, then, lest the purpose of arbitration be frustrated, the article provides that the *compromis* shall be established by a thoroughly non-partisan body, in no way connected with the controversy and having no interest in its termination other than to see that justice be done.

The consequence of a refusal to frame the *compromis* when an agreement to arbitrate is made can be seen at once by a reference to the second article of the proposition relating to contract debts.

Proposition of the United States of America concerning the treatment of contractual debts

In order to prevent armed conflicts between nations, of a purely pecuniary origin growing out of contract debts claimed from the Government of one country by the Government of another country as due to its nationals, the signatory Powers agree not to resort to armed force for the collection of such contract debts.

This stipulation, however, shall not apply when the debtor State rejects or ignores a proposal of arbitration, or, in case of acceptance, makes it impossible to establish the *compromis*, or, after arbitration, fails to comply with the award.

It is further agreed that the arbitration here considered shall conform to the procedure provided by Chapter III of the Convention for the pacific settlement of inter-
[384] national disputes adopted at The Hague, and that it will determine, in so far as the parties should not have agreed thereupon, the validity and the amount of the debt and the time and mode of settlement.

The third paragraph of this same document shows the reasons for the provisions of the present article, because the Convention of 1899 fails to provide any machinery for the establishment of the *compromis* when the parties fail to agree. It would seem as advisable as it is advantageous to resort to the Court rather than to run the risks of armed intervention. But it must be borne in mind that the provision of the article only applies if the offer of arbitration made by one party has been accepted by the other.

Recourse to the Court is permissive, not obligatory. "This provision is not applicable if its acceptance is conditioned upon the *compromis* being established by some other method."

The provision has no retroactive effect and looks only to the future, and if a party litigant desires that the delegation shall have nothing to do with the settlement of the *compromis,* it may, by virtue of this special clause, exclude the delegation.

The third paragraph of Article 19 is general in its nature and applies to the treaty of arbitration concluded or renewed after the present Convention goes into effect. If the parties have stipulated in the treaty that a *compromis* be framed, it is for the parties to determine either in the treaty or in some subsequent period the exact terms of the *compromis.*

If the parties have explicitly excluded the delegation without providing another method for the formulation of the *compromis,* or if they have implicitly excluded the delegation by providing another method for the formulation of the *compromis,* the delegation is incompetent.

If the parties have provided in the treaty a particular form of *compromis,* or if they have entrusted with its negotiation a particular tribunal or individual, then the Court is incompetent, unless a new agreement, superseding the old one, be made. And, finally, in order that the optional nature may clearly appear, the article does not content itself with designating some

machinery other than the Court, but provides that the Court shall be incompetent if it is explicitly excluded.

In the last sentence of the paragraph the right is expressly reserved to the State in controversy to reject the intervention of the Court, if it should appear that the difference does not properly belong to the category of questions to be submitted to obligatory arbitration, or, in other words, if, in the opinion of the defendant, the case is not included in the arbitration treaty, or, if included, it falls under the reservations concerning vital interests or honor. It appears, therefore, that the will of the State is free, and that the provisions of the article, while they may be a great aid to the parties litigant, cannot in any way be considered as a restriction of their freedom. In a word, the delegation is competent to prepare the *compromis,* if the parties litigant, who always possess the right to frame it, have not excluded its competence in the matter of contract debts or in any other case.

ARTICLE 20

Each of the parties concerned may nominate a judge of the Court to take part, with power to vote, in the examination of the case submitted to the delegation.

If the delegation acts as a commission of inquiry, this task may be entrusted to persons other than the judges of the Court. The traveling expenses and remuneration to be given to the said persons are fixed and borne by the Powers appointing them.

[385] The present article is in reality composed of three parts. The first is of a general nature, and permits each party to the controversy to add a judge of the Court to the delegation. The second provides that if the delegation acts as a commission of inquiry, each party litigant may add an additional member, who shall be chosen either within or without the Court, leaving the party unrestricted liberty of choice.

In the third place, it is stipulated that those persons so added who are not members of the Court shall be compensated by the parties who have appointed them. Let us consider each of these provisions in turn.

As frequently stated, the purpose of the delegation is to determine smaller cases with accuracy and dispatch. But it may happen that the case is of sufficient interest to justify the intervention of a larger body. In such case either party would be free to select a judge from the Court to act with the delegation until the case under question was disposed of. The delegation would then consist of five persons, still a small but more considerable body. Doubt was expressed whether the persons so added should take part in the formation of the judgment, or whether they should merely assist the judges in reaching a conclusion. Upon reflection, it was felt that a judge should always act as a judge, not as an expert; and that if added to the delegation he could not, without derogation of his functions, be denied the right to take part in the judgment.

The functions of the delegation as a commission of inquiry have already been dealt with in Article 18, and it is therefore unnecessary here to discuss their expediency. The question involved is whether or not the delegation sitting as a commission of inquiry should be enlarged by the presence of other persons, and if so, whether those persons should be chosen within or without the Court. The peculiar nature of the questions submitted to a commission of inquiry furnished the answer. A commission of inquiry is not a judicial body. It is not necessarily composed of judges, and, even if it were, these judges find the facts of the case without deducing therefrom legal responsibility. If it be, for instance, a question of fact concerning an accident upon the seas, it would seem that the judges would be much aided by the presence of naval experts; that experts so added should form an integral part of the dele-

gation sitting as a commission, and should take part in the determination, because judicial training is not essential where no legal judgment is pronounced.

Shall the parties adding members to the delegation compensate them in proportion to the services rendered? If the added members are judges of the Court, all thought of compensation is excluded, because while sitting with the delegation they merely perform judicial duties for which they are already compensated. If the added member is not a judge of the Court, he should only receive compensation from the party whose representative he is for the time being. Therefore the last paragraph provides that:

> The traveling expenses and remuneration to be given to the said persons are fixed and borne by the Powers appointing them.

The provision concerning expenses was added in response to certain inquiries made in the committee, and in order to prevent any doubt or uncertainty that might arise. Mr. KRIEGE's brief explanation to the committee is so conclusive and in point as to justify quotation from the minutes without addition or modification: [1]

> It is advisable to distinguish two possible contingencies. If the parties call upon the judges of the Court, the community shall bear the expenses; because it is the intention of the authors to place the whole Court at the disposal of those who wish to resort to it. If, on the contrary, [386] they look beyond the Court and choose judges or experts, the parties themselves shall defray the expenses involved in their choice.

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[1] Fifth meeting.

ARTICLE 21

The contracting Powers only may have access to the Court of Arbitral Justice set up by the present Convention.

The question involved in this article is one of policy regarding access to the Court of signatory or non-signatory Powers. The authors of the project, upon the suggestion of his Excellency Mr. ASSER, thought that the Court should be established and open only to the signatory Powers; otherwise an additional and unjustifiable financial burden would be thrown upon the Powers supporting the Court. But it should be borne in mind, as stated by the president [Mr. BOURGEOIS] that the term "contracting Powers" likewise includes those who may subsequently adhere to the Convention. The committee concurred in the views expressed by the article, which was adopted without further observation.

ARTICLE 22

The Court of Arbitral Justice follows the rules of procedure laid down in the Convention of July 29, 1899, except in so far as the procedure is laid down in the present Convention.

It seems unnecessary to comment upon this article, for it would be difficult to express more concisely and clearly the idea which inspired it. It may, however, be said that the article offers an additional evidence of the relation between the proposed Court and the Permanent Court of Arbitration. The rules of the procedure devised by the Convention of July 29, 1899, are applicable to and binding upon the proposed Court, unless the present Convention shall expressly or indirectly modify them.

ARTICLE 23

The Court determines what language it will itself use, and what languages may be used before it.

This article deals with a single but important detail. If it is intended that the judge and agent shall understand one another, it is necessary that the language used be either common to or understood by both.

In the amendments to the Convention of 1899 it is provided that the parties litigant shall determine the language or languages to be used in the Court of Arbitration. In an International Court, composed of a large number of judges, it is evident that the imposition of any one language might greatly embarrass or even work a hardship upon the judges. The parties litigant must therefore accept the language or languages prescribed by the Court.

ARTICLE 24

The International Bureau serves as channel for all communications to be made to the judges during the interchange of pleadings provided for in Article 39, paragraph 2, of the Convention of July 29, 1899.

This article was justified by Mr. KRIEGE, on behalf of the authors of the project, in the following manner: [1]

> [387] Under Article 39 of the Convention of 1899 the acts and documents produced by the parties are to be communicated to the members of the tribunal of arbitration in the form and within the periods fixed by the tribunal. Pursuant to the resolution of the committee of examination C, this provision will be modified so that in a general way the *compromis* will contain stipulations as to form and time in which the communication shall take place. This rule, however, does not appear to be appli-

[1] Seventh meeting.

cable to proceedings before the Court consisting of a large number of judges. It will be preferable to order that the International Bureau shall serve as a channel for all communications to be made to the judges of the Court.

To this statement it seems unnecessary to add anything.

ARTICLE 25

For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the Power on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests addressed for this purpose shall be executed according to the means at the disposal of the Power applied to under its domestic legislation. They can only be rejected when this Power considers them likely to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

This article is conceived in the desire to aid the Court in the largest measure possible in the performance of its judicial duties. It is taken, with slight modifications, from the revised project of the commissions of inquiry elaborated by committee of examination A. The last paragraph has been added in order to bring the article into harmony with the Prize Court Convention, which contains similar provisions.

The essence of the article consists in the fact that the signatory Powers pledged themselves to cooperate with the Court in order to inform parties, witnesses, and experts who may reside in different countries and to whom the notifications are to be addressed. It was thought advisable to permit the Court to address itself directly to the Governments in order to avoid

the delay incident to transmission through diplomatic channels. Should, however, the latter course de deemed preferable, the Court may request the appropriate organ of the Government in whose territory the Court or the delegation is sitting to act in its behalf. It may happen, however, that this intervention might affect injuriously the sovereignty or security of the power upon which the request is made. Suppose, for example, a State secret be involved. If such be the case, it follows necessarily that the Power should have the right to refuse without exposing itself to criticism, for it should be the sole judge whether or not its interests are affected by the proposed communication.

It is readily understood that the applications of this article necessarily involve some expense, and it is reasonable to provide that the outlay be fully reimbursed; but as the request is in the interest of justice, it should not be made a source of revenue.

Finally, the project provides for notice to be given to the parties in the place where the Court holds its session, and in such case the notices should be served by the International Bureau.

[388] It is difficult to see wherein these provisions are subject to criticism. They do indeed bind States to perform certain services, but the signatory Powers bind themselves by signing the Convention, and undertake in advance to comply with requests of this nature that may be made upon them. It is in the interest of the community of nations that the States thus voluntarily take upon themselves certain obligations.

There will be noticed in the wording of paragraph 2 a slight modification, purely formal and intended only to make the intent and meaning of the text clearer.

ARTICLE 26

The discussions of the Court are under the control of the president or vice president, or, in case they are absent or can not act, of the senior judge present.

The judge appointed by one of the parties in dispute can not preside.

The first paragraph calls for no comment.

The last paragraph supposes that the judge of one of the parties litigant may be president, vice president, or president *pro tempore*. In any of these cases he should yield the presidency during the trial of the controversy, because the impartiality of the proceedings might be questioned if the subject or citizen of a party litigant wielded the influence which naturally belongs to the presidency.

ARTICLE 27

The Court considers its decisions in private, and the proceedings are secret.

All decisions of the Court are arrived at by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge, in the order of precedence laid down in Article 4, paragraph 1, is not counted.

The deliberations of the Court are and should be secret, lest outside influence might in some way make itself felt.

Only the results of the deliberations, that is to say, the determination of the case, have an interest for the public.

The decision of the Court is reached by a majority of the judges present, without taking into consideration the judges who may happen to be absent. Should no majority exist, that is to say, if the Court is evenly divided, some means must be provided to produce a majority and thus reach a decision. Were a preponderating influence given to the presiding officer, this might enhance the authority of the office to such a degree

as to endanger in certain circumstances the fair and impartial administration of justice. It was therefore thought preferable to secure the requisite majority by discarding the vote of the judge last in the order of precedence established by Article 4, paragraph 1. This method has the advantage of giving the Court the benefit of the skill and experience of the judge whose vote is not counted, inasmuch as he takes part in the trial as well as in the formulation of the judgment.

ARTICLE 28

The judgment of the Court must give the reasons on which it is based. It contains the names of the judges taking part in it; it is signed by the president and registrar.

The first clause of this article seems clear and satisfactory. A difference of opinions exists whether the names of the judges should be mentioned who dissent from the judgment of the Court. Some undoubtedly believe that a judge who does not concur with the majority has a right to have the fact of
[389] his dissent recorded, even though he does not deliver a dissenting opinion. On the other hand, many believe that a statement of dissent would tend to weaken the judgment by showing that the opinion was not unanimous. The authors of the project were unwilling to decide this delicate question. They contented themselves with the provision that the names of the judges shall be mentioned, without indicating concurrence or dissent. In order to prevent the implication of assent or dissent, it is provided that the judgments and decrees of the Court are to be signed by the president and clerks. The president's signature does not imply concurrence in the judgment: it merely guarantees the genuineness of the judgment, in the same way that the signature of the clerk guarantees the authenticity of the official copy of the judgment.

ARTICLE 29

Each party pays its own costs, and an equal share of the costs of the trial.

The original project did not contain this article, which was added upon the suggestion of his Excellency Mr. MARTENS, in order that there should be no doubt of the obligation of the parties litigant to meet the costs in the case other than those which fall under the head of general expenses.

ARTICLE 30

The provisions of Articles 21 to 29 receive analogous application in the procedure before the delegation.

When the right of attaching a member to the delegation has been exercised by one of the parties only, the vote of this member attached is not recorded, if the votes are evenly divided.

The first paragraph indicates in no uncertain way that the delegation is an integral part of the Court, and, as such, the procedure of the Court must apply to and be followed by the judges sitting as a delegation.

The second paragraph seeks to avoid a deadlock caused by equality of votes in the delegation. Article 20, it will be recalled, permits each party litigant to add a judge or another member to the delegation. Should both avail themselves of that provision, the judges thus designated would stand upon a basis of perfect equality.

If only one of the parties should avail itself of this right, there is no reason why the vote of the judge so added should not be counted. If, however, there were an even division of votes, it seemed to the authors of the project inadvisable to make the decision turn upon the fortuitous presence of a judge who is not a regular member of the Court. In such a case the vote will not be counted.

ARTICLE 31

The general expenses of the Court of Arbitral Justice are borne by the contracting Powers.

The Administrative Council applies to the Powers to obtain the funds requisite for the working of the Court.

In the absence of a definite composition of the Court and the ascertainment of the degrees in which the signatory Powers shall be represented in the Court, it seems useless to attempt to determine the proportion in which the expenses will be borne. Suffice to say, that the expenses should be borne by the signatory Powers, since the institution is created for their benefit: *cuius est commodum, eius est periculum.*

The final paragraph of the article is purely formal and self-explanatory.

[390] ARTICLE 32

The Court itself draws up its own rules of procedure, which must be communicated to the contracting Powers.

After the ratification of the present Convention, it shall meet as early as possible, in order to elaborate these rules, elect the president and vice president and appoint the members of the delegation.

Article 22 states that the Court shall follow the rules of procedure prescribed by the Convention of July 29, 1899, except as otherwise provided in the present Convention.

The provisions of the Convention of 1899 and Part II of the present Convention are general in their nature. This may seem to be a lack of precision, but it was thought advisable to lay down certain general principles of procedure and to permit the Court to frame its rules of procedure according as circumstances and experience might dictate. In any event the Court should communicate its rules, when framed, to the signatory Powers so that litigants may know in advance the rules to be observed and followed in the conduct of the case.

The second paragraph looks for as early a session after the ratification of the conventions as possible. This is imperative because, until the Court meets and organizes, it cannot be ready for the determination of cases. Its rules of procedure can only be properly prepared in the presence of and with the cooperation of the judges. The president and vice president must be elected, not in advance, but by the judges themselves when they assemble, and the delegation could not well be chosen in advance. It is necessary, therefore, that the Court should meet at as early a moment as possible after the ratification of the Convention, in order to perfect its organization and to frame its rules of procedure. This would be in itself a justification for the assembling of the Court, and would give the judges ample employment for that leisure which it is claimed they will enjoy, at least in the first session of their existence.

ARTICLE 33

The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated through the Netherland Government to the contracting Powers, which will consider together as to the measures to be taken.

While Article 32 makes the Court competent to determine its rules, it was not thought advisable to permit it to modify the provisions of the present Convention concerning procedure. It was felt that the amendments to be made to the general procedure should be the result of experience, and should therefore be suggested merely as experience shows it is necessary. The Court, however, is a judicial body, not a legislature, and the proposed modifications should not take effect until they have been communicated to the signatory Powers and approved by them. What concerns all should be the work of all.

PART III.—*Final provisions*

ARTICLE 34

The present Convention shall be ratified as soon as possible.

[391] The ratifications shall be deposited at The Hague.

A *procès-verbal* of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the contracting Powers.

ARTICLE 35

The Convention shall come into force six months after its ratification.

It shall remain in force for twelve years, and shall be tacitly renewed for periods of twelve years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

The denunciation shall only have effect in regard to the notifying Power. The Convention shall continue in force as far as the other Powers are concerned.

These provisions are wholly of a formal nature, and do not seem to need explanation or comment.

We do not conceal from ourselves the fact that our work still presents gaps and difficulties. It is hardly necessary to call attention to the absence, in the project, of provisions for the constitution of the Court and the selection of the judges. These questions were discussed at great length in the committee, but no solution acceptable to all the States represented could be found. It is to be hoped that an agreement will soon be reached in this respect, and, prompted by this hope, the committee declared itself in favor of the following resolution:

> The Conference recommends to the signatory Powers the adoption of the project it has voted for the creation of a Court of Arbitral Justice, and putting it into force as soon as an agreement has been reached respecting the selection of the judges and the constitution of the Court.[1]

Our aim, gentlemen, has been not merely to build the beautiful façade for the palace of international justice; we have erected, indeed furnished the structure, so that the judges have only to take their places upon the bench. It is for you to open the door; it is for the Governments to usher them in. There can be no doubt that suitors, filled with a sense of deference and security, will appear before this imposing Areopagus in such numbers as to demonstrate that the judicial settlement of international disputes has ceased to be a formula of the future by becoming that of the present!

[1] See the discussion in *Actes et documents*, vol. ii, First Commission, first subcommission, committee of examination B, eighth meeting. [This recommendation became *vœu* No. 1 in the Final Act.]

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DRAFT CONVENTION RELATIVE TO THE CREATION OF A COURT OF ARBITRAL JUSTICE [1]

PART I.—*Constitution of the Court of Arbitral Justice*

ARTICLE 1

With a view to promoting the cause of arbitration, the contracting Powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Court of Arbitral Justice, of free and easy access, composed of judges representing the various juridical systems of the world, and capable of ensuring continuity in arbitral jurisprudence.

ARTICLE 2

The Court of Arbitral Justice is composed of judges and deputy judges chosen from persons of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts, or be jurists of recognized competence in matters of international law.

The judges and deputy judges of the Court are appointed, as far as possible, from the members of the Permanent Court of Arbitration. The appointment shall be made within the six months following the ratification of the present Convention.

[In the official edition of the Proceedings of the Second Hague Peace Conference the Draft Convention is printed as Annex B to the Proceedings of the Ninth Plenary Session of the Conference held on October 16, 1907, volume i, pages 392-397.]

[1] Text voted by the Commission.

ARTICLE 3

The judges and deputy judges are appointed for a period of twelve years, counting from the date on which the appointment is notified to the Administrative Council created by the Convention of July 29, 1899. Their appointments can be renewed.

Should a judge or deputy judge die or retire, the vacancy is filled in the manner in which his appointment was made. In this case, the appointment is made for a fresh period of twelve years.

ARTICLE 4

The judges of the Court of Arbitral Justice are equal, and rank according to the date on which their appointment was notified (Article 3, paragraph 1). The judge who is senior in point of age takes precedence when the date of notification is the same.

[393] The deputy judges are assimilated, in the exercise of their functions, with the judges. They rank, however, below the latter.

ARTICLE 5

The judges enjoy diplomatic privileges and immunities in the exercise of their functions, outside their own country.

Before taking their seat, the judges and deputy judges must, before the Administrative Council, swear or make a solemn affirmation to exercise their functions impartially and conscientiously.

ARTICLE 6

The Court annually nominates three judges to form a special delegation, and three more to replace them should the necessity arise. They may be reelected. They are balloted for. The persons who secure the largest number of votes are con-

sidered elected. The delegation itself elects its president, who, in default of a majority, is appointed by lot.

A member of the delegation cannot exercise his duties when the Power which appointed him, or of which he is a *ressortissant,* is one of the parties.

The members of the delegation are to conclude all matters submitted to them, even if the period for which they have been appointed judges has expired.

Article 7

A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties.

A judge cannot act as agent or advocate before the Court of Arbitral Justice or the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act for one of the parties in any capacity whatsoever so long as his appointment lasts.

Article 8

Every three years the Court elects its president and vice president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are even, by lot.

Article 9

The judges of the Court of Arbitral Justice receive an annual salary of 6,000 Netherland florins. This salary is paid at the end of each half year, reckoned from the date on which the Court meets for the first time.

In the exercise of their duties during the sessions or in the special cases covered by the present Convention, they receive the sum of 100 florins *per diem*. They are further entitled to receive a traveling allowance fixed in accordance with regulations existing in their own country. The provisions of the present paragraph are applicable also to a deputy judge when acting for a judge.

These emoluments are included in the general expenses of the Court dealt with in Article 31, and are paid through the International Bureau created by the Convention of July 29, 1899.

[394] ARTICLE 10

The judges may not accept from their own Government or from that of any other Power any remuneration for services connected with their duties in their capacity of members of the Court.

ARTICLE 11

The seat of the Court of Arbitral Justice is at The Hague, and cannot be transferred, unless absolutely obliged by circumstances, elsewhere.

The delegation may choose, with the assent of the parties concerned, another site for its meetings, if special circumstances render such a step necessary.

ARTICLE 12

The Administrative Council fulfils with regard to the Court of Arbitral Justice the same functions as to the Permanent Court of Arbitration.

ARTICLE 13

The International Bureau acts as registry to the Court of Arbitral Justice, and must place its offices and staff at the dis-

posal of the Court. It has charge of the archives and carries out the administrative work.

The secretary general of the International Bureau discharges the functions of registrar.

The necessary secretaries to assist the registrar, translators and shorthand writers are appointed and sworn in by the Court.

ARTICLE 14

The Court meets in session once a year. The session opens the third Wednesday in June, and lasts until all the business on the agenda has been transacted.

The Court does not meet in session if the delegation considers that such meeting is unnecessary. However, when a Power is party in a case actually pending before the Court, the pleadings in which are closed, or about to be closed, it may insist that the session should be held.

When necessary, the delegation may summon the Court in extraordinary session.

ARTICLE 15

A report of the doings of the Court shall be drawn up every year by the delegation. This report shall be forwarded to the contracting Powers through the International Bureau. It shall also be communicated to the judges and deputy judges of the Court.

ARTICLE 16

The judges and deputy judges, members of the Court of Arbitral Justice, can also exercise the functions of judge and deputy judge in the International Prize Court.

[395] PART II.—*Competency and procedure*

ARTICLE 17

The Court of Arbitral Justice is competent to deal with all cases submitted to it, in virtue either of a general undertaking to have recourse to arbitration or of a special agreement.

ARTICLE 18

The delegation (Article 6) is competent:

1. To decide the arbitrations referred to in the preceding article, if the parties concerned are agreed that the summary procedure, laid down in Part ..... of the Convention of July 29, 1899, is to be applied.

2. To hold an inquiry under and in accordance with Part III of the Convention of July 29, 1899, in so far as the delegation is entrusted with such inquiry by the litigant parties acting in common agreement. With the assent of the parties and as an exception to Article 7, paragraph 1, the members of the delegation who have taken part in the inquiry may sit as judges, if the case in dispute becomes the subject of arbitration, either by the Court, or the delegation itself.

ARTICLE 19

The delegation is also competent to settle the *compromis* (Article 31 of the Convention of July 29, 1899) if the parties are agreed to leave it to the Court.

It is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach an understanding through the diplomatic channel, in the case of:

1. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into

force, providing for a *compromis* in all disputes and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the delegation. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of questions to be submitted to obligatory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one Power by another Power as due to its *ressortissants*, and for the settlement of which the offer of arbitration has been accepted.

This arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

ARTICLE 20

Each of the parties concerned may nominate a judge of the Court to take part, with power to vote, in the examination of the case submitted to the delegation.

If the delegation acts as a commission of inquiry, this task may be entrusted to persons other than the judges of the Court. The traveling expenses and remuneration to be given to the said persons are fixed and borne by the Powers appointing them.

[396] ARTICLE 21

The contracting Powers only may have access to the Court of Arbitral Justice set up by the present Convention.

ARTICLE 22

The Court of Arbitral Justice follows the rules of procedure laid down in the Convention of July 29, 1899, except in so far as the procedure is laid down in the present Convention.

ARTICLE 23

The Court determines what language it will itself use, and what languages may be used before it.

ARTICLE 24

The International Bureau serves as channel for all communications to be made to the judges during the interchange of pleadings provided for in Article 39, paragraph 2, of the Convention of July 29, 1899.

ARTICLE 25

For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the Power on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests addressed for this purpose shall be executed according to the means at the disposal of the Power applied to under its domestic legislation. They can only be rejected when this Power considers them likely to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

ARTICLE 26

The discussions of the Court are under the control of the president or vice president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by one of the parties cannot preside.

ARTICLE 27

The Court considers its decisions in private, and the proceedings are secret.

All decisions of the Court are arrived at by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge, in the order of precedence laid down in Article 4, paragraph 1, is not counted.

ARTICLE 28

The judgment must give the reasons on which it is based. It contains the names of the judges taking part in it; it is signed by the president and registrar.

[397] ARTICLE 29

Each party pays its own costs, and an equal share of the costs of the trial.

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The provisions of Articles 21 to 29 are applicable by analogy to the procedure before the delegation.

When the right of attaching a member to the delegation has been exercised by one of the parties only, the vote of this member attached is not recorded, if the votes are evenly divided.

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The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated through the Netherland Government to the contracting Powers, which will consider together as to the measures to be taken.

PART III.—*Final provisions*

ARTICLE 34

The present Convention shall be ratified as soon as possible.

The ratification shall be deposited at The Hague.

A *procès-verbal* of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the contracting Powers.

ARTICLE 35

The Convention shall come into force six months after its ratification.

It shall remain in force for twelve years, and shall be tacitly renewed for periods of twelve years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

The denunciation shall only have effect in regard to the notifying Power. The Convention shall continue in force as far as the other Powers are concerned.

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ARTICLES OF CONFEDERATION OF THE UNITED STATES OF AMERICA, 1777

Article 9

. . . The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any state in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names, as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons

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[Revised Statutes of the United States, 1878, p. 9. In the official edition of the Proceedings of the Second Hague Peace Conference, this extract from Article 9 of the Articles of Confederation is printed as Annex C to the Proceedings of the Ninth Plenary Session of the Conference held on October 16, 1907, volume i, page 398.]

whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each state, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the state where the cause shall be tried, 'well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward': provided also that no state shall be deprived of territory for the benefit of the United States. . . .

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Figures in italics refer to article numbers of the draft convention relative to the creation of a court of arbitral justice.